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BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

COMPLETED

ORIGINAL

More Guidance And Supervision Needed Over Federal Grand Jury Proceedings

Criminal justice officials do not fully know what grand jury materials should be kept secret nor have they established adequate security procedures and practices. Identities of witnesses and persons under investigation as well as the nature of grand jury investigations are often unnecessarily disclosed in the news media, public court files, and public court proceedings.

Two Judicial Conference Committees and the chief judges in six Federal court districts visited generally agreed with GAO's report. The Department of Justice said that the report contributes to the improvement of grand jury procedures but at the same time distorts the problems with keeping grand jury proceedings secret.

GAO disagreees with the Department's criticisms and believes action must be taken to prevent disclosures about ongoing grand jury proceedings. GAO has made numerous recommendations which will help to correct the problems noted.

GGD-81-18
OCTOBER 16, 1980

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-193697

To the President of the Senate and the
Speaker of the House of Representatives

This report discusses actions necessary to better protect and maintain the secrecy of Federal grand jury proceedings. Chapter 2 contains recommendations to the Judicial Conference of the United States to initiate actions to improve the procedural and secrecy rules related to grand jury matters and the supervision of grand jury proceedings. We also recommend that the Attorney General take immediate steps to improve the security practices of Department of Justice personnel involved with grand jury proceedings.

We made this review to determine how well the criminal justice system was accomplishing the purposes of grand jury secrecy and to identify areas needing improvement. By improving the security of grand jury proceedings, the effectiveness of one of the Government's more important tools to combat organized crime, drug trafficking, and white collar crime will be improved.

Copies of this report are being sent to the Director, Office of Management and Budget; the Chairmen, House and Senate Judiciary Committees; the Director, Administrative Office of the United States Courts; the Chairman, Judicial Conference of the United States; the Attorney General; and the chief judge of each Federal district court.

Comptroller General
of the United States

Enclosure

A

COMPTROLLER GENERAL'S
REPORT TO CONGRESS

MORE GUIDANCE AND SUPERVISION NEEDED OVER FEDERAL GRAND JURY PROCEEDINGS

D I G E S T

The grand jury is one of the Government's more effective tools to combat organized crime, drug trafficking, and white-collar crime. The effective prosecution of these crimes depends largely on securing grand jury proceedings to encourage witnesses to testify and produce evidence and keep persons under investigation from hampering investigations. However, hundreds of times information about grand jury proceedings has been disclosed in the news media, public court files, and public court proceedings with the result that either

--witnesses had their identities revealed, before any indictments were returned, including some who were murdered, intimidated, or disappeared,

--reputations of persons never indicted were damaged,

--persons under investigations were identified before indictment, or

--grand jury investigations were dropped or delayed.

These disclosures were not necessarily made illegally or surreptitiously and, in fact, are often allowable or even required under existing laws and procedures. (See ch. 2.)

However, because such disclosures can have serious consequences to witnesses and effective law enforcement, GAO believes the Federal judiciary, as the

supervisor of grand jury proceedings, needs to provide more definitive guidance on what grand jury information should be protected and how it should be protected.

LACK OF CLARITY ABOUT WHAT SHOULD BE SECRET AND HOW TO PROTECT IT CAUSES DISCLOSURES

Disclosures of grand jury proceedings will continue until district courts receive definitive guidance and direction on

--what specific information and documents must be kept secret, and

--what custodians of secret material and information must do to keep it secret.

What is grand jury material?

Rule 6(e) of the Federal Rules of Criminal Procedure prohibits disclosing "matters occurring before the grand jury" and identifies who may properly hear, see, or receive grand jury information. Transcripts of grand jury proceedings and the deliberations and vote of the grand jury clearly qualify as "matters occurring before the grand jury," and cannot be disclosed. Beyond this type of information, however, no consensus exists among the judiciary, Government attorneys, or law enforcement agents on precisely what grand jury "matters" are covered by rule 6(e). Opinions differ on whether the following should be kept secret:

--Court proceedings ancillary to grand jury proceedings that deal with and discuss ongoing grand jury activities. (See p. 8.)

--Grand jury subpoenas, which contain the names of witnesses. (See p. 13.)

--Evidence developed independently of, but later introduced to, the grand jury. (See p. 14.)

--Copies of documentary materials presented to the grand jury. (See p. 14.)

--Internal Government memorandums and other documents that tend to reveal what transpires before the grand jury. (See p. 14.)

--Grand juror identities while the grand jury is sitting. (See p. 15.)

How should grand jury security be protected?

The Federal judiciary does not have a consistent program to secure grand jury materials and information to

--limit access to, store, and dispose of grand jury information (see pp. 18, 22, and 26);

--identify grand jurors who have connections with persons under investigation (see p. 27);

--insure that grand jury rooms are secure so as to protect the proceedings and identities of grand jurors and witnesses from disclosure (see p. 28); and

--audit existing security procedures and practices (see p. 30).

Because such procedures are not in place, disclosures have come from Federal district courts, grand jurors, grand jury court

reporters, U.S. attorney offices, organized crime strike force offices, U.S. marshal offices, and to a lesser extent, law enforcement agencies.

RECOMMENDATIONS

GAO recommends that the Judicial Conference of the United States:

--Develop a proposed amendment to rule 6(e), Federal Rules of Criminal Procedure, defining what must be kept secret during the duration of grand jury proceedings.

--Establish guidelines setting forth the minimum security requirements needed to protect grand jury materials.

--Require each custodian of grand jury materials, including court supervised court reporters, to establish procedures consistent with the security guidelines and document them in a security plan to be approved by the appropriate district court.

--Review Jury System Improvement Act plans so that the courts and the Department are in a position to react appropriately whenever there are situations calling for maintaining the confidentiality of grand juror names.

--Provide for periodic internal audits of all custodians of grand jury materials to determine whether they are complying with approved security plans and to identify needed improvements in existing security procedures and practices.

--Evaluate the physical security around grand jury rooms and develop a plan to upgrade and modify deficient facilities to assure that grand jury proceedings will not be compromised.

GAO also recommends that the Attorney General improve the security practices of U.S. attorneys, organized crime strike forces, U.S. marshals and court reporter personnel by developing and issuing interim security guidelines to be used until the Federal judiciary establishes security requirements. GAO further recommends that grand jurors be routinely screened for possible conflicts of interest with cases to be presented to the grand jury. (See pp. 33 and 34.)

AGENCY COMMENTS AND OUR EVALUATION

The chief judges in six of the seven districts visited were in general agreement with the overall message of the report. The seventh chief judge chose not to comment on the report. The Chairman of the Jury Operations Committee, speaking for the judiciary, expressed concern about the grand jury security issues raised in this report. He said that the two Judicial Conference committees having jurisdiction over grand jury operations would consider during their July 1980 meetings the report's findings, conclusions, and recommendations. Subsequently, GAO was told the committees believed the issues raised deserved further study and that special subcommittees have been established to perform the study. (See pp. 35 to 38.)

The Department of Justice said that the report contains some constructive criticisms and, on the whole, contributes to the improvement of Federal grand jury procedures. It further stated that it wholeheartedly endorsed the thrust of the report and that the incidence of genuine breaches of grand jury secrecy had increased in recent years. The Department said that improved security measures could reduce inadvertent breaches of secrecy. The Department then cited a number of actions it has

underway or under study in response to GAO's report. At the same time, the Department said that the report distorts the problems attending grand jury secrecy; exaggerates the incidence of secrecy breaches; narrowly focuses on the principles underlying grand jury secrecy; and advocates sweeping changes to judicial procedures. (See pp. 38 to 49.)

GAO strongly disagrees with the Department's criticisms and believes that its comments contain misconceptions about the report and confuses the basic message. GAO believes its detailed analysis has proven that disclosures have resulted in the identification of witnesses, targets, and the nature of investigations. GAO further believes that since it only reviewed 7 of the 95 Federal district courts, the disclosures identified are only the "tip of the iceberg." As a result of the facts presented in this report on disclosures, GAO believes that if secrecy is to remain an important part of the grand jury process, action must be taken to implement rules and methods designed to prevent disclosures about ongoing grand jury proceedings. (See pp. 43 to 49.)

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ABBREVIATIONS

DEA	Drug Enforcement Administration
FBI	Federal Bureau of Investigation
GAO	General Accounting Office
IRS	Internal Revenue Service

CHAPTER 1

INTRODUCTION

The fifth amendment to the Constitution guarantees that no person can be prosecuted for a serious Federal crime unless the person has been indicted by a Federal grand jury. 1/ Any offense punishable by death must be prosecuted by indictment. Also, offenses punishable by more than a year in prison must be prosecuted by indictment unless the defendant waives this right. Federal grand juries return about 20,000 indictments annually.

A Federal grand jury is comprised of citizens impaneled by the courts to investigate criminal activities. Grand juries do not ordinarily hear both sides of a criminal case or determine guilt or innocence; rather, they determine, from the evidence provided, whether sufficient reason exists to indict a person for a crime. They are one of the Government's more effective tools to combat organized crime, drug trafficking, and white-collar crime because grand juries have the power to subpoena persons to testify and produce documents or records. Persons who do not comply can be placed in contempt by the court and imprisoned for the remainder of the grand jury's term, or until they cooperate.

Federal grand juries consist of 23 members, 16 of whom must be present to conduct business. These members, or jurors, must represent a fair cross-section of the community and be selected in a nondiscriminatory way. An indictment requires the vote of at least 12 jurors. A grand jury may be impaneled for as long as 18 months and may be extended up to 36 months.

GRAND JURY SECRECY

Rule 6(e) of the Federal Rules of Criminal Procedure mandates that grand jury proceedings be conducted in secret. In ruling on grand jury issues, the Supreme

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1/The rights of military personnel to indictment by a grand jury are more limited.

Court and other courts have clearly stated the following purposes of grand jury secrecy:

--To encourage witnesses to come forward and testify freely and confidently.

--To protect the reputations and physical well-being of witnesses who testify against persons suspected of crimes.

--To keep those who may be indicted from intimidating witnesses or fleeing before indictment.

--To protect grand jurors from intimidation and outside influences.

--To protect the reputation of persons under investigation who are later cleared or never indicted.

Once the grand jury returns an indictment, the need for maintaining secrecy becomes less compelling. After an indictment is returned, competing legal principles come into play that often require disclosure of grand jury information to the defendant. This usually occurs pursuant to a defendant's own motion or under court order. During the pendency of the grand jury proceeding, however, all of the reasons for maintaining secrecy apply. This report focuses on disclosures up until the point the grand jury completes its investigation and an indictment is returned. It is during this period that the ramifications of disclosure are most serious.

The rule 6(e) secrecy mandate is subject to four major exceptions. A grand jury witness is not required to keep his testimony or observations secret, the courts can order disclosures of grand jury matters, Government attorneys can disclose information to other Government attorneys to use in performing their duties, and Government attorneys can disclose needed information to personnel to assist such attorneys in enforcing Federal criminal laws.

All persons attending grand jury sessions--except witnesses--are bound to secrecy. Persons employed by grand jury reporters, such as transcribers and typists, are also bound to secrecy even though they are not present at the grand jury proceedings. Persons who knowingly violate secrecy requirements are subject to contempt penalties.

GRAND JURY ROLE OF THE FEDERAL JUDICIARY

The Judicial Conference of the United States, made up of judges from various levels of the Federal judiciary--the Supreme Court, the U.S. Courts of Appeals, U.S. District Courts, and the U.S. Bankruptcy Courts--is the policymaking body of the judiciary. Among its duties the Conference considers and proposes to the Supreme Court changes to the Rules of Criminal Procedure. The Administrative Office of the U.S. Courts assists the Conference and district courts by gathering data and preparing reports on judicial operations.

Federal district courts, governed by the Federal Rules of Criminal Procedure, supervise the grand jury process while grand juries summon witnesses to testify and produce documents at grand jury sessions. In addition, the district courts impanel and discharge the grand jurors, compel witnesses to testify, order jailing of uncooperative witnesses, and resolve questions about grand jury procedures.

GRAND JURY ROLE OF THE DEPARTMENT OF JUSTICE

The Attorney General of the United States, the Nation's chief law enforcement officer, is represented at the district court level by Government attorneys in the Department of Justice. These representatives usually include U.S. attorneys and organized crime strike force attorneys. U.S. attorneys prosecute a wide range of criminal cases, whereas organized crime strike force attorneys prosecute only organized crime cases.

Government attorneys in the Department of Justice direct the investigative activities of Federal grand juries. They advise jurors on points of law, coordinate the appearances of witnesses and the presentation of evidence, and question most witnesses. In addition, they direct the activities of law enforcement agencies--such as the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA)--which assist in grand jury investigations. Government attorneys are also the primary custodians of evidence that has been presented to the grand jury.

OBJECTIVE, SCOPE, AND METHODOLOGY

We made our review to determine how well the criminal justice system has met the purposes of grand jury secrecy. We

--reviewed Federal laws, rules, and regulations;

--reviewed and evaluated policies and procedures regarding the security of grand jury information;

--interviewed district court judges and other officials who routinely have access to grand jury information;

--reviewed relevant internal audit reports; and

--observed actual practices being used to safeguard grand jury information.

We performed detailed work in seven U.S. judicial districts: eastern and western Missouri, western Washington, Nevada, New Jersey, and eastern and southern New York. In southern New York, the chief judge prohibited us from doing detailed work in the clerk of the court's office. In addition, we did limited work in two other judicial districts--southern California and northern Illinois. We also did extensive work in Department of Justice offices of U.S. attorneys, organized crime strike forces, Federal Bureau of Investigations, Drug Enforcement Administration, and the Marshals Service; and the Internal Revenue Service offices. In total, we performed work in 49 different offices as shown in the table on page 50. The offices visited were selected on the basis of the extent of investigative grand jury activity in the area, known situations identified that had indications of disclosures occurring, and to provide an adequate geographical and audit coverage of the criminal justice system. By reviewing newspaper articles and public documents filed in district courts, interviewing judicial and law enforcement personnel, and direct observation, we identified numerous disclosures which compromised the purposes of grand jury secrecy. The disclosures we identified were made during fiscal years 1973 through 1979. However, 328 of the 492 disclosures were made during fiscal years 1978 and 1979, and 421 of the disclosures were identified in the seven judicial districts visited.

CHAPTER 2

THE FEDERAL JUDICIARY NEEDS TO DEFINE AND PROVIDE BETTER GUIDANCE ON SECURING GRAND JURY PROCEEDINGS

The judiciary is responsible for exercising general supervisory authority over the grand jury and protecting the secrecy of its proceedings. However, judges, Government attorneys, and law enforcement agents do not clearly know what materials are to be kept secret and, do not have adequate procedures and practices to secure the materials.

Rule 6(e) of the Federal Rules of Criminal Procedure provides the basic guidance on what information should be kept secret. Yet, this rule is often interpreted and applied in such a manner which allows the identities of witnesses and targets and the nature of grand jury investigations to be disclosed to the public and the news media before an indictment is returned. For example

--judges disagree on whether proceedings ancillary to the grand jury proceedings (referred to as preindictment proceedings) should be open to the public, and

--judicial and law enforcement officials disagree on what documents and information rule 6(e) requires to be kept secret.

Furthermore, district courts differ on whether grand juror names should be kept secret while a grand jury is sitting.

Even if the guidelines on what should be kept secret were clear, the security of grand jury materials can be breached (and, in fact, has been breached) because of the poor security procedures and practices used by the courts, U.S. attorneys, U.S. marshals, and court reporters:

--Security procedures are lax or nonexistent for limiting access to, storing, and disposing of grand jury materials.

--Grand jurors are not usually screened to determine whether they have connections with persons being investigated.

--Grand jury rooms do not provide adequate security to keep unauthorized persons from eavesdropping and seeing witnesses and jurors.

--Audits are not made to assess the security practices in use in each judicial district.

The inconsistent approach to securing grand jury proceedings has resulted in witnesses being injured by targets and therefore refusing to cooperate with grand jury investigations; targets fleeing before indictment; reputations of persons never indicted being damaged; and prosecutions being dropped and delayed. Specifically, we documented numerous instances of the public availability of privileged grand jury information including

--343 witnesses who had their identities revealed before any indictments were returned by grand juries, including 5 who were murdered, 10 who were intimidated, and 1 who disappeared;

--10 persons whose reputations were damaged even though they were never indicted;

--147 targets who were publicly identified before being indicted;

--23 grand jury investigations that had to be dropped or delayed; and

--168 grand jury investigations where the specific nature of the investigations were revealed and discussed.

In total, in 492 separate instances, 1/ disclosures of information compromised one or more of the purposes of grand jury secrecy. Two hundred and seventy one of the disclosures occurred during 1978 and 1979 and came from the seven districts reviewed. Because we reviewed only 7 of the 95 Federal district courts, we believe the disclosures identified are only the "tip of the iceberg." These disclosures were not necessarily made illegally or surreptitiously and, in fact, are often allowable under existing law and procedures. These disclosures occurred while the grand jury was sitting, that is, the period where the need for secrecy is most important.

1/ The instances detailed above do not total to 492 because many of the disclosures we identified had more than one effect.

WHAT NEEDS TO BE KEPT SECRET IS NOT CLEARLY DEFINED

Even though the purposes of grand jury secrecy have been clearly defined, the specific materials and information which must be kept secret to achieve these purposes have not. Rule 6(e) of the Federal Rules of Criminal Procedure provides the basic guidance on what grand jury matters must be kept secret.

The rule provides, in part, that:

> "(2) General Rule of Secrecy -- A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist * * *, an attorney for the government * * * shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule * * *." (Underscoring supplied.)

Rule 6(e) covers nearly everyone--except witnesses--who are connected with or who are performing support functions for grand jury proceedings. Grand jury secrecy obligations do not apply to witnesses and witnesses are under no legal obligation to refrain from disclosing their identity, the fact that they have been subpoenaed, the contents of their testimony, and any other occurrence that they may have observed before the grand jury. Although witnesses in some cases undoubtedly have a motivation to disclose testimony to those with whom they are in alliance, it should be recognized that in other cases it may be in the best litigative and personal interest of the witness to maintain the secrecy of his knowledge of occurrences before the grand jury, including his identity, and the contents of his own testimony.

An understanding of what constitutes a "matter occurring before the grand jury" is essential for determining specifically what must be kept secret. However, a lack of consensus exists about whether rule 6(e) covers the identities of subpoenaed witnesses, grand jurors, and evidence developed by investigative agents out of the grand jury's presence and without the aid of the grand jury's compulsory process. Generally, matters that qualify as grand jury material entitled to rule 6(e) protection include testimony actually delivered before the grand jury and the deliberations and vote of the grand jury.

This lack of agreement on what should be kept secret results in information which may compromise the purposes of secrecy being made available to the public and the news media. Specifically, information is available because

--judges differ on whether preindictment proceedings should be open to the public;

--judges, Government attorneys, and law enforcement agents differ on what information rule 6(e) requires to be kept secret; and

--courts differ on whether grand juror names should be made public while the grand jury is sitting.

Opinions differ on whether preindictment proceedings should be held in open court

During a grand jury investigation, a judge may have to preside over various preindictment hearings at which information about the particular investigation is discussed. These hearings arise, for example, when witnesses refuse to testify or produce subpoenaed materials and when a subpoenaed witness requests immunity from prosecution in exchange for testimony. In such cases, the judge must rule on whether the witness must testify, produce the subpoenaed materials, and/or be granted immunity. If the witness persists in his refusal to testify after being ordered by the court to do so, the judge must decide whether the witness should be held in contempt of court and jailed.

For judges to decide these matters, the witness' relationship to the case under investigation must be discussed. Accordingly, the identities of witnesses and targets, the nature of expected testimony, and the extent to which the witness is cooperating are often revealed during preindictment proceedings. Because the matters discussed can compromise the purposes of grand jury secrecy, some judges close the preindictment proceedings to the public and the press; others do not. When the proceeding is open, information that might otherwise be kept secret under rule 6(e) becomes available to the public and the press.

Judges opinions differ on whether preindictment proceedings should be closed or open under rule 6(e). Of the 15 judges we interviewed in 6 districts, 1/ 7 routinely

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1/ The chief judge, southern New York, denied us access to the judges in his district.

hold preindictment proceedings in open court, 4 routinely close them, and 4 decide when to open or close them on a case-by-case basis.

Read literally, rule 6(e)'s prohibitions on disclosure apply only to "matters occurring before the grand jury." Preindictment proceedings do not physically occur before the grand jury, providing the basis for rulings that preindictment proceedings are not subject to rule 6(e)'s secrecy requirement. Under this view, the absence of a statute authorizing closure means that the proceeding must be held in open court in accordance with the established practice of public judicial proceedings. The other view that preindictment proceedings should be closed, is based on the premise that these proceedings are extensions of the grand jury process and if opened to the public, would disclose information otherwise subject to rule 6(e)'s secrecy requirements.

Open preindictment proceedings are a major source of information which can compromise the purposes of grand jury secrecy. In 25 cases we were able to establish links between open proceedings and later newspaper articles containing information about the identities of witnesses and targets and the nature of grand jury investigations. For example, in one district a newspaper reporter based a story on a Government motion presented to the court at an open preindictment proceeding. The U.S. attorney used the motion to support his request to hold a grand jury witness in contempt of court for refusing to produce documents to the grand jury. The newspaper article revealed the following about the grand jury's investigation:

--The identity of the target of the investigation.

--The fact that the target's income tax affairs were being investigated.

--The nature of the target's financial relationship with a local business.

--The identities of three witnesses who were subpoenaed to bring financial records to the grand jury for examination.

In another case, an open contempt hearing was held because a witness would not tell the grand jury about her knowledge of an attempted bank robbery. Subsequently, she filed a motion to overturn the contempt order, claiming her right to secrecy under rule 6(e) was being violated because newspaper articles carried accounts of the questions she was asked by the grand jury and her refusal to answer them. Federal attorneys told the court that the source of the news reports came from Government documents filed with the court holding the contempt hearing. Because these proceedings were held in open court, all documents introduced were available to the public. The attorneys said the newspapers could use these documents any way they wanted to. The court ruled that rule 6(e) was not violated.

In 262 cases, documents presented at open preindictment proceedings and filed in public files revealed details of grand jury investigations. These documents are, of course, available to anyone who wants them, including targets of investigations. Appendix II contains two documents commonly found in public files which usually reveal the identities of witnesses and targets. The first document is a Department of Justice authorization to a U.S. attorney to apply to the court for a grant of immunity for a witness. The second document is the court's order granting the witness immunity from prosecution and compelling him to testify and produce requested information.

An example of the kind of information contained in the public files involved an investigation into violations of Federal narcotics laws. Documents in the file identified a key witness and the identities of the two targets of the investigation. The assistant U.S. attorney handling this investigation told us that he requested the motion and order granting the witness immunity from prosecution to be sealed because he did not want the targets to know the witness was cooperating with the Government and receiving immunity. The assistant said the witness was afraid that he could be hurt if this information got to the targets.

The judge in this case denied the request because he believes that decisions he makes during preindictment proceedings should be open to public scrutiny. He said that having open preindictment proceedings may compromise the purposes of grand jury secrecy, but he will continue to

hold public proceedings until he receives other instructions from the Judicial Conference of the United States or the Congress.

In another case, documents in the public files contained intimate details of a grand jury investigation into the activities of persons linked to organized crime. The documents were available to the public because they had been presented before an open court proceeding. The documents named eight targets and showed that they were being investigated for interstate gambling, obstruction of justice, extortion, and interstate racketeering.

Many law enforcement officials claim that open preindictment proceedings often make their jobs more difficult. For example, an organized crime strike force chief said that much of the publicity in the news about an ongoing organized crime investigation came from preindictment proceedings open to the public. He said that when defense counsels file preindictment motions with the court, Government attorneys must respond. This response can result in disclosing much information about the grand jury's investigative intent and purpose. In his opinion, these disclosures make effective law enforcement more difficult because witnesses can be identified and targets can hamper investigations on the basis of the knowledge obtained.

The differing views on the propriety of closure for proceedings ancillary to grand jury proceedings need to be reconciled, preferably through an amendment to rule 6(e) of the Federal Rules of Criminal Procedure. Also involved in the closure issue, however, is a clash between the interest in preserving the secrecy of grand jury proceedings, and the interest, deriving from the first and sixth amendments to the Constitution, in preserving the public nature of court proceedings. From a constitutional standpoint, useful guidance on the propriety of closure is provided by Gannett Co. v. De Pasquale County Judge of Seneca County, New York, 47 U.S.L.W. 4902 (1979), and Richmond Newspapers, Inc. v Virginia, 48 U.S.L.W. 5008 (1980), the two most recent Supreme Court decisions on closing judicial proceedings.

In Gannett, the Supreme Court upheld a lower court's order to close a pretrial evidentiary suppression hearing. All parties to the hearing agreed to closure. The Gannett Co., a newspaper publisher, appealed the trial court's

closure order, claiming that such hearings must be open to the public and the press under the first and sixth amendments to the Constitution.

The Supreme Court disagreed, explaining that although public proceedings are the norm in the American judicial system, a defendant's right to an open proceeding is based on the sixth amendment, whose main purpose is to protect an accused from prosecutorial and judicial abuses. The Supreme Court stated that the sixth amendment's guarantee to the accused of a "public trial" for "criminal prosecutions" gave neither the public nor the press an enforceable right of access to pretrial hearings. The Court concluded that if the trial judge and all parties to the pretrial hearing agree, the hearing may be closed when necessary to assure a fair hearing and to avoid prejudicial publicity.

The question whether Gannett applied to closure of the trial itself reached the court in Richmond Newspapers v. Virginia, a case where the defendant, the prosecution, and trial judge agreed to closure of a criminal trial.

In Richmond, the Court explained that Gannett dealt with a pretrial hearing, not with closure of the trial itself. The Court found implicit in the first amendment a right of the public and the press to attend criminal trials, and noted that, in contrast to the pretrial proceeding in Gannett, there usually exist in the context of a criminal trial, alternatives to closure. Exclusion of trial witnesses from the courtroom and sequestration of jurors were cited as examples. The Court concluded that absent an "overriding interest" articulated in the findings, the trial of a criminal case is presumptively open to the public and the press. Waiver by the accused of his sixth amendment right to a public proceeding would not change this result.

As applied to ancillary grand jury proceedings involving a motion to quash a subpoena, witness immunity, motions to compel testimony, and the like, Gannett, as clarified by Richmond, would seem to provide a basis for closure if the witness affirmatively consents, and the court, without objection from the prosecution, orders closure upon a case by case determination to avoid prejudice or harm to the witness (or others), or to ensure the integrity of the witness' testimony before the grand jury.

The criteria for closure of other ancillary proceedings, principally those involving an adjudication of contempt against a witness, are less clear. 1/ However, there is a suggestion in Richmond that the criteria for closing a contempt proceeding are analogous to the criteria for closing criminal trials, the latter being presumptively open to the public and the press. To the extent this criteria may apply to contempt proceedings, neither the consent of the witness to closure nor a general interest in preserving grand jury secrecy would in itself overcome the presumption that the hearing be open.

We have not addressed the issue whether closure of ancillary proceedings over the witness' objection would be constitutionally permissible under any circumstance. Even if nonconsensual closure were permissible, however, legitimate questions could be raised whether closure over the witness' objection would serve any practical or useful purpose, since witnesses clearly remain free under rule 6(e) to disclose their identity, the fact that they have been subpoenaed, the contents of their testimony, and any other occurrence they may have observed before the grand jury.

Officials have different opinions on what specific materials should be kept secret

Judges, Government attorneys, and investigative agencies have widely differing views on what information and documents should be kept secret under rule 6(e). These differing views

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1/ The right to a "public trial" is explicitly guaranteed by the sixth amendment only for "criminal prosecutions." Although contempt proceedings are not criminal prosecutions in the constitutional sense, they, like a criminal trial, may have the natural and immediate consequence of incarceration. The plurality opinion in Richmond referred to an earlier case involving a witness contempt proceeding to illustrate that, even in the absence of an explicit constitutional provision, due process demands appropriate regard for the requirements of a public proceeding in cases of contempt. See 48 U.S.L.W. at 5013, citing with approval, Levine v. United States, 362 U.S. 611 (1960).

have resulted in public disclosure of the identity of witnesses, persons under investigation, and the nature of the investigations, as well as the identity of grand jurors while the grand jury is sitting. This situation is in large measure attributable to the uncertainty of whether secrecy requirements apply to

--grand jury subpoenas which identify witnesses, and

--evidence gathered out of the grand jury's presence and without the aid of the grand jury's compulsory process.

Subpoenas are the fundamental documents used during a grand jury's investigation because, through subpoenas, grand juries can require witnesses to testify and produce documentary evidence for their consideration. Subpoenas can identify witnesses, potential targets, and the nature of an investigation. Rule 6(e) does not provide specific guidance on whether a grand jury's subpoena should be kept secret. Additionally, case law has not consistently stated whether the subpoenas are protected by rule 6(e).

District courts still have different opinions about whether grand jury subpoenas should be kept secret. Out of 40 Federal district courts we contacted, 36 consider these documents to be secret. However, 4 districts do make them available to the public.

Some courts also have different views on whether evidence developed or statements obtained out of the grand jury's presence and without the aid of the grand jury's compulsory process should be kept secret. Some have ruled that such evidence or statements do not receive rule 6(e) protection, even though the evidence might tend to reveal the nature of the grand jury investigation and what may transpire during a grand jury proceeding.

Many Government prosecutors and investigative agents also hold this view. They believe that rule 6(e) covers only the testimony and documents actually presented before the grand jury. Thus, in their view, information obtained voluntarily from witnesses before they enter the grand jury room is not covered by rule 6(e). In addition, if a witness provides the Government with the same information after testifying that he provided to the grand jury, that information would not be covered by rule 6(e).

An FBI official qualified this position even further by stating that the only material covered by rule 6(e) is material actually presented before the grand jury and later used as evidence at trial. A DEA and an IRS official had still another view. They copy all material provided to the grand jury but do not consider their copies to be covered by rule 6(e).

These differing views reflect disagreement about what constitutes a "matter occurring before the grand jury" within the meaning of rule 6(e). Under the broader view of rule 6(e) coverage, any documentary materials which might reveal the target and nature of a grand jury investigation qualify for rule 6(e) protection. This view is based on the premise that if the minutes of a grand jury proceeding are secret, as they are in every jurisdiction, they should not be disclosed indirectly through the separate release of information or documents that were provided to the grand jury. In the case of public documents provided a grand jury, these jurisdictions believe that they should not be disclosed in a manner that tends to reveal the fact of presentment to a grand jury.

Under the narrower view of rule 6(e) coverage, documentary materials generally do not qualify for rule 6(e) protection, even though the materials are presented to the grand jury as evidence and are recorded in the grand jury's minutes. The reasoning here is that any documentary materials prepared independently of the grand jury are not covered by rule 6(e) because they are not matters that actually occurred before the grand jury. Even under this view, however, grand jury minutes, including any segments of the minutes which identify and discuss documentary evidence, remain secret.

In our opinion, these interpretations of what information and materials must be kept secret illustrate the need for clarification of what constitutes rule 6(e) material.

Decision needed as to whether grand jury names should be kept secret

One purpose of grand jury secrecy is to keep grand jurors from being influenced or asked about grand jury activities. In the context of cases where importuning of

grand jurors is likely to occur, accomplishing that purpose could depend on whether the jurors' identities are kept secret while they are serving on a grand jury. Yet, in six of the seven districts reviewed, the juror names were available.

In two of the seven districts, the courts consider grand juror names public information and routinely provide them to the local news media for publishing. In four other districts, the courts consider grand juror names confidential, but the public can still obtain the names because the grand jurors are impaneled in open court. During these impanelments, the grand jurors are sworn in and have their duties and responsibilities explained to them. In addition, the names are announced and documented in the minutes of the impanelment. Thus, anyone who attends the impanelment or asks for the minutes can readily learn the names of the grand jurors. In the seventh district, the court impanels grand jurors in secret and does not release their names while they are sitting.

Specifics about ongoing grand jury investigations and names of grand jurors are revealed during impanelments, which could allow targets to approach and question grand jurors about grand jury investigations. For example, in one of the districts which considers grand juror names confidential, a newspaper reporter attended an open impanelment proceeding for two new grand juries and wrote an article which revealed

--the names of the 46 new grand jurors, including the names of the foremen and deputies and

--the specific investigations and targets which each grand jury would be considering.

The article, for example, stated:

> "An old panel of regular grand jurors will continue to meet on Thursdays to handle half a dozen investigations already under way. This panel is believed to be working on the investigations of alleged corruption in the Clark County Assessor's office, the fire-bombing of the Chicken Ranch, and two illegal bookmaking operations involving

> restauranteur Gus Gallo and gambler William Deming. The old regular grand jury will continue until these investigations are culminated but will not hear any new matters,
>
> * * * * *
>
> "The special federal grand jury is expected to catch up with the investigation started into the activities of alleged mobster Anthony Spilotro and his links with Argent Corp. boss Allen Glick." (Source: Las Vegas Review Journal dated August 9, 1979.)

Provisions of the Jury Systems Improvement Act of 1978 (28 U.S.C. 1863 et seq.) govern the circumstances under which grand juror names may be kept confidential or made available to the public while the grand jury is sitting. The act states that each district court must develop a plan for selecting grand jurors and trial jurors and provides that the court can fix the time when juror names will be made public. The act states, in part:

> "* * * If the plan permits these names [jurors] to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so requires" (28 U.S.C. 1863(b)(7)).

Although other provisions of the Jury Systems Improvement Act contemplate that the identity of grand jurors will be made public in the ordinary case, the act also provides the judiciary with sufficient flexibility to assure the confidentiality of a sitting grand juror's identity, especially in the period preceding indictment, when such confidentiality is warranted by the unusual sensitivity of a case or the likelihood that grand jurors will be importuned or physically harmed. District court plans that take these factors into account will place the courts and the Department on a footing where they can react appropriately when situations calling for confidentiality of grand juror names arise.

ADEQUATE MEANS TO PROTECT GRAND JURY SECRECY HAVE NOT BEEN ESTABLISHED

No coordinated, Government-wide program exists to protect the secrecy of grand jury proceedings. Neither the Federal judiciary (as supervisor) nor the Department of Justice (as primary custodian of grand jury materials) has established consistent policies and procedures to protect grand jury secrecy. Accordingly, the security level provided to grand jury materials varies substantially among offices. A consistent security program is needed to reduce the high potential for inadvertent disclosures of secret grand jury information which now exists because of poor security precautions. As a minimum, consistent procedures are needed to

--limit access to, store, and dispose of grand jury information;

--identify grand jurors who have connections with potential targets; and

--insure that grand jury rooms are located and insulated to protect the proceedings and the identities of grand jurors and witnesses from disclosure.

Basic procedures to protect grand jury material and information from disclosure are not in place

As a minimum, a sound security program to protect grand jury materials should have procedures to

--restrict access to authorized personnel,

--store materials when not in use, and

--dispose of materials no longer needed.

The offices having the greatest access to grand jury materials and information--U.S. attorney, organized crime strike force, court clerk, and court reporter--had the poorest security procedures; whereas, the law enforcement agencies--FBI, DEA, and IRS--had the tightest security.

Because the former offices contain the most grand jury materials, their poor procedures create an especially high potential for improper disclosures.

U.S. attorney and organized crime strike force offices are the primary custodians of grand jury materials. Their attorneys are responsible for directing and coordinating grand jury investigations and for presenting evidence to the grand jurors. Accordingly, their offices contain all information relevant to a case, including the names of witnesses, targets, and informants and the specific details of the Government's case.

Court clerks are also custodians of various grand jury documents. Most of these documents come from preindictment proceedings, such as immunity and contempt proceedings and motions to quash subpoenas. In some districts, the clerk's office also keeps copies of served subpoenas. This was the case in three of the seven district courts visited.

Court reporters attend and prepare transcripts of grand jury proceedings. These transcripts provide a verbatim printed record of grand jury proceedings and usually identify the nature and course of the investigation, witnesses and the degree of their cooperation, evidence, targets, and possible prosecutive strategies. Court reporters can be either independent contractors hired by U.S. attorney or organized crime strike force offices or court employees.

Unauthorized persons can gain access to secret grand jury information

Thirty-nine of the 49 offices we reviewed did not have procedures to keep unauthorized persons from gaining access to information and documents which disclosed tne names of witnesses and targets, and the nature of investigations. As a result, grand jury information was readily available and actually disclosed to unauthorized personnel, such as employees with no official need, maintenance personnel, visitors, and bystanders. The following examples illustrate the poor practices which can compromise grand jury secrecy.

Fifteen of the 18 U.S. attorney, organized crime strike force, and U.S. marshal offices reviewed did not provide instructions to subpoenaed witnesses on how or where

to report to avoid being seen and identified. Therefore, witnesses frequently reported to the public reception areas of these offices and identified themselves. Thus, their names were readily learned by anyone in the public reception area. In one district, for example, while we waited in the reception area of a U.S. attorney office, three witnesses and their attorneys came in and openly identified themselves to the receptionist. Further, when an assistant U.S. attorney arrived to talk with them, we overheard the name of the target, the nature of the investigation, and the expected testimony of the witnesses.

In another district, an assistant U.S. attorney said that grand jurors and assistant U.S. attorneys sometimes discussed grand jury proceedings in elevators and other public areas when newsmen were present. The assistant told us that such discussions may have caused the prosecution of five "extremely dangerous" persons to be thwarted when the targets fled just before they were to be arrested on narcotics trafficking charges. The five, members of a motorcycle gang, learned from newsmen that they were about to be arrested based on a sealed indictment returned by the Federal grand jury. The newsmen had set up cameras near the targets' home in anticipation of the imminent arrests and, when asked, told the targets what they were doing.

Even where the identity of subpoenaed grand jury witnesses are supposed to be kept secret in a particular district, the way a subpoena is served to a witness can reveal his identity to unauthorized persons. Two examples were identified in which witnesses' identities and the fact that they were going to testify before the grand jury were revealed because subpoenas were served to them at their place of employment in full view of their fellow employees. In one case, the witness refused to testify and quit her job after being threatened by two fellow employees. In the other case, the witness motioned the court to have the subpoena set aside.

In one district, the court clerk's office has a long-standing policy of allowing newspaper reporters to examine any documents lying on desks, including documents the office is processing. While we were working in the district, the local newspaper carried an article which outlined the thrust of an ongoing grand jury investigation and identified the target and several witnesses. Upon inquiry, we found

that the information came from a document that the clerk's office was supposed to keep secret. A newspaper reporter who was perusing files lying on desks had found the document in a miscellaneous file still being processed. The court clerk told us that a deputy clerk had misclassified the document; it should not have been in the file. Subsequently, the deputy clerk's employment was terminated. Regardless, the policy of allowing newsmen access to documents and files lying on desks is contrary to maintaining sound security over grand jury materials.

In another district the U.S. marshal's office did not restrict maintenance personnel from the holding cell area when grand jury witnesses were being held there. Accordingly, the office permitted a janitor to enter the holding cell area where two well-known, protected witnesses were being held waiting to go before the grand jury. The identities of the protected witnesses had been a well-guarded secret during the lengthy investigation. The marshal believes the janitor disclosed the witnesses' identities and location to the news media, because the news media arrived at the marshal's office soon after the janitor concluded her work. As a result, the identities of the witnesses were well publicized in the press.

In four of the seven districts visited, court reporters and their assistants were not properly cleared to have access to grand jury proceedings and transcripts because required security background checks had not been made on them. Department of Justice internal auditors also found this problem in two of seven other districts they reviewed to examine U.S. attorney practices in acquiring litigative transcripts. In addition, not only had background checks not been made, but most of the responsible U.S. attorneys and organized crime strike force attorneys did not even know who the subcontract typists were. This is particularly notable in that these persons usually operate out of their homes with no direct supervision.

This situation has great potential for breaches of grand jury secrecy and, in fact, we learned of four instances in which court reporters leaked grand jury transcripts to targets of grand jury investigations. In two instances the court reporters were prosecuted and convicted and in the other two instances, no prosecutive action was taken but the reporters were fired.

Grand jury information is not properly stored when not being used

We identified numerous instances in which grand jury information was poorly stored when not in use. We observed unattended grand jury information faceup on desk tops, in unlocked and open rooms, and in unlocked file cabinets. Offices of U.S. attorneys, organized crime strike forces, U.S. marshals, court clerks, and court reporters had the poorest storage practices.

The seven U.S. attorney and four organized crime strike force offices reviewed were not adequately storing grand jury materials when they were not being used. Of these 11 offices:

--Ten had no formal procedures or requirements for storing grand jury materials.

--Nine had no security officer to monitor internal security practices.

--Eight had no agency personnel present when janitorial services were performed.

--Nine did not require grand jury information to be locked when not under the direct supervision of authorized personnel.

--Nine left grand jury materials on desk tops and in unlocked file cabinets and rooms when no official was present.

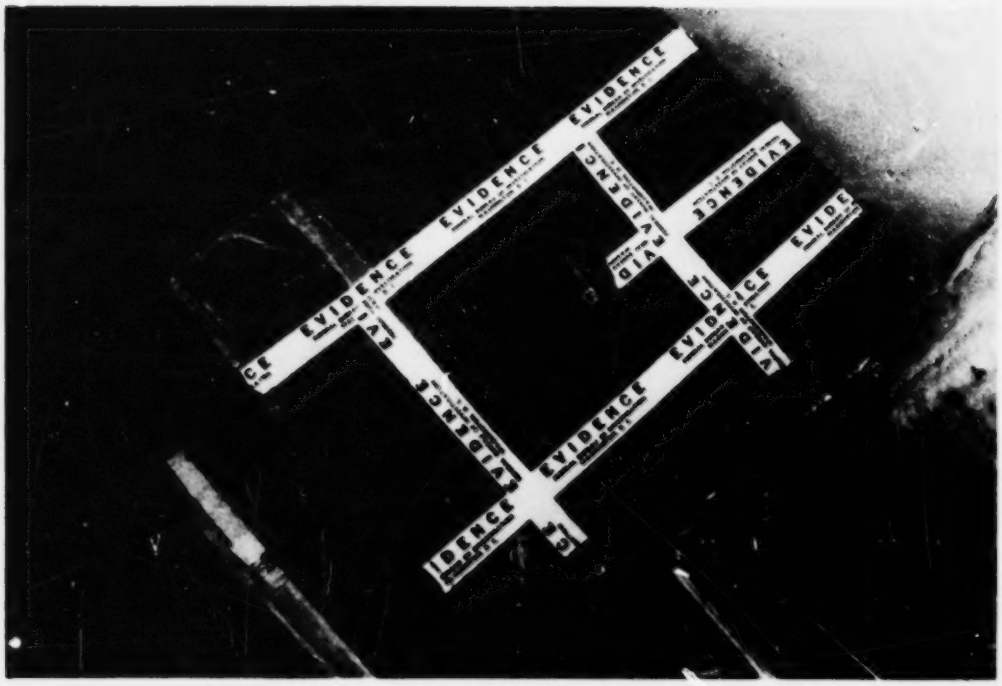
--Four did not routinely change their safe combinations, and 2 of the 4 were still using the standard factory combination.

--Seven did not have lockable file cabinets for each attorney; therefore, these attorneys could not protect their grand jury materials even if they wanted to do so.

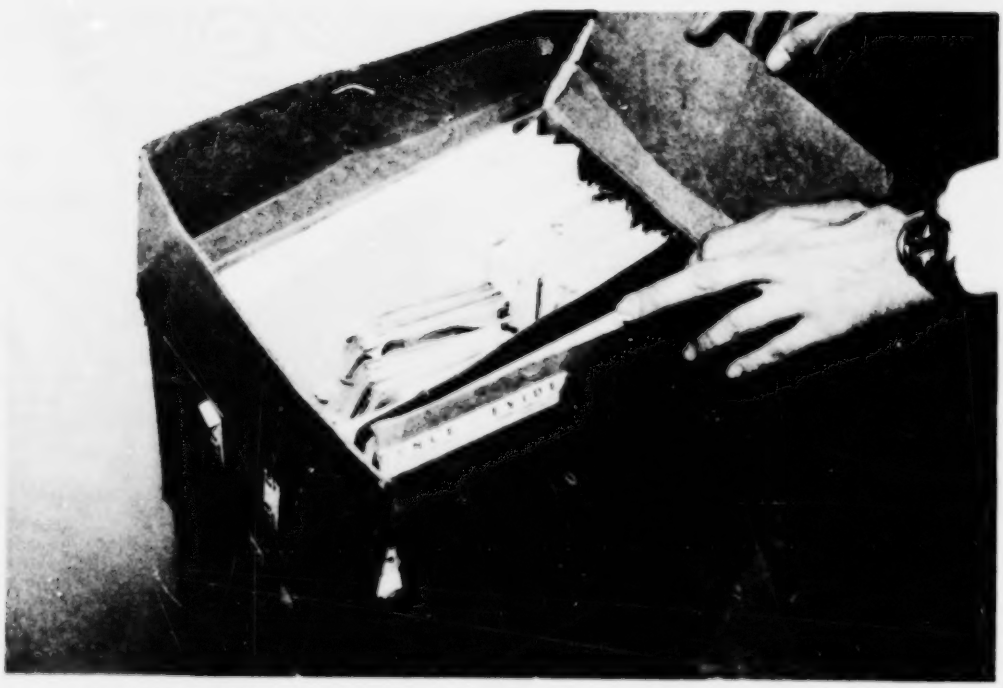
We found 12 open boxes of grand jury evidence stored in an open room adjacent to one of our audit sites. (See pp. 23 and 24.) Our inspection of these boxes showed that they contained such items as individual and company bank

statements, accounting ledgers, and correspondence. This information concerned two grand jury cases where merged indictments had been returned and the defendants had been convicted. However, both cases were under appeal. One of the Government attorneys responsible for the information said that the open boxes contained grand jury information but said he could not find a place to store them.

UNATTENDED, OPEN ROOM CONTAINING GRAND JURY MATERIALS STORED IN CARDBOARD BOXES



UNSEALED BOX CONTAINING GRAND JURY EVIDENCE



THIS DEMONSTRATES EASE OF ACCESS TO GRAND JURY MATERIALS

Five of the seven U.S. marshal offices visited showed that witness attendance certificates and travel voucher receipts, log books containing witness names, and subpoenas were left on desk tops during working hours and never locked up at night. In six of the seven offices, all employees and custodial and guard personnel had 24-hour access to areas containing this material.

Four of six district court clerk offices stored grand jury materials in unlockable file cabinets, thereby creating the potential for unauthorized persons to obtain access to the materials. In one district, for example, an unlockable file cabinet contained over a dozen files marked "secret." Each file contained various documents relating to closed and ongoing grand jury investigations. A typical document was a "secret" affidavit used to support the Government's request for an arrest warrant for a material grand jury witness. The affidavit identified a target whose tax affairs were being investigated by the grand jury and showed that the target was a hidden owner in a business. The affidavit also identified individuals who were fronting for the target and some grand jury witnesses who were hesitant to testify for fear the target would retaliate.

Furthermore, in three clerk offices, secret grand jury documents were contained in public files. For example, in one of these three districts, four sealed envelopes were found in the public files. These envelopes, which were labeled with the names of grand jury witnesses, showed that the witnesses' testimony was contained within. The clerk of the court in that district was unaware that these documents were in the files and did not know how they got there. After our discussion, the envelopes were removed and placed in the vault.

In six of the seven districts reviewed, contract court reporters or their typists worked out of their homes, storing grand jury tapes, notes, and transcripts in spare rooms and garages. Six of the seven reporters we interviewed had not been told how to secure the grand jury material in their possession, and only two had taken precautions to secure their grand jury materials. In six of the seven district courts, and in all U.S. attorney or organized crime strike force offices visited, requirements had not been established for court reporters to meet in securing grand jury information. An assistant U.S. attorney told us of two instances in which court reporter offices

were burglarized and grand jury transcripts stolen. In March 1979, the Department of Justice's internal auditors reported on poor court reporter storage practices involving seven districts other than the ones we visited. 1/

Grand jury information is not properly disposed of when no longer needed

Improper disclosure is always possible if confidential materials are not properly disposed of when no longer needed. Although FBI, DEA, and IRS consistently used sound disposal practices, court clerk, U.S. attorney, organized crime strike force, U.S. marshal, and court reporter offices did not. Of the 21 U.S. marshal, court reporter, and court clerk offices reviewed, only 3 had secure ways to destroy unneeded materials. Seven offices did not have secure methods and 11 considered such methods unnecessary because they never throw anything away. Of the 11 U.S. attorney and organized crime strike force offices reviewed, 8 merely put grand jury materials--such as lists of witnesses, subpoenas with typographical errors, carbons, typewriter ribbons, and extra copies--into wastebaskets to be removed by the regular cleaning personnel.

Even though six of the above offices had effective ways to destroy grand jury materials no longer needed, only three were using them. In one of the offices, the U.S. attorney was particularly concerned about disposal practices. He noted that many sensitive documents, including grand jury materials, were not being destroyed through the office shredder. Accordingly, he sent a memorandum to his assistants in which he said:

> "Quite obviously, we have no control over these documents once they leave our office. They may or may not get recycled and it is certainly possible that someone having access to these records could make improper use of them. Believe it or not, there are people outside of this office who have a strong interest in our activities. Accordingly, whenever documents of a sensitive nature are no longer needed by an Assistant or when our secretaries have unneeded copies, will you please see

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1/Acquisition of Litigative Transcripts in U.S. Attorneys Offices, March 1979.

that they are marked for shredding and that they are thus destroyed." (Underscoring supplied)

In the eight offices not destroying grand jury materials no longer needed, Government attorneys generally played down the need for secure disposal practices.

Grand jurors should be routinely screened for conflicts of interests

Grand jurors are generally not screened to determine whether they have some connection or possible conflict of interest with suspected targets of grand jury investigations. Screening could be done readily because each of the almost 200,000 citizens annually selected to serve on a grand jury is required to complete a questionnaire which requests background information on their qualifications. Among the information requested is the juror's name, address, employer, and prior criminal record. Yet, only one of the seven districts visited reviews this material on a regular basis.

We learned of four instances in which a grand juror had a possible conflict of interest with targets of investigations. For example, an organized crime strike force attorney told us of a case in which a special grand jury was investigating a major organized crime figure. Well into the investigation, someone in the attorney's office noticed that the target was driving a grand juror to the courthouse on grand jury days. Further investigation revealed that the juror was the target's maid; therefore, the juror was discharged. Although the Government never determined if the juror disclosed secret information to the target, the organized crime strike force attorney believed that it was likely.

In another district, the organized crime strike force was investigating whether a nationally known organized crime figure had hidden ownership in a business. Although this case is ongoing, the chief judge and an organized crime strike force attorney told us that a grand juror was dismissed because he disclosed grand jury information to the target. They said that the juror worked for the business thought to be secretly owned by the target. Through an intermediary, the juror approached the target and offered to exchange grand jury information for advancement in the business. According to the attorney, early screening of the juror's qualification questionnaire would have revealed

his place of employment and disclosed the possible conflict of interest. He said that if this had been done the conflict could have been fully evaluated and the breach of security perhaps prevented. In the other two cases, the jurors were dismissed after their links with targets were clearly established.

Because jurors can serve on a grand jury for 18 months or longer, they may be exposed to several sensitive investigations. As the above examples show, a juror may have a potential or actual conflict of interest with targets of one or more of the investigations. Although conflicts were identified in the above cases, many other such conflicts may be going undetected because juror questionnaires are not routinely screened. Accordingly, Federal prosecutors should routinely screen these questionnaires for possible juror conflicts of interest with cases to be presented to the grand jury. This procedure would involve negligible additional time and cost and could prevent serious breaches of grand jury secrecy.

Grand jury room facilities can compromise grand jury secrecy

In six of the seven districts reviewed, physical grand jury room facilities were inadequate to keep unauthorized persons from identifying witnesses and jurors. In all seven districts, witnesses and jurors have to enter and leave grand jury rooms through public corridors, and in six districts, witnesses had to wait in public hallways or be commingled in waiting rooms. In addition, we observed that optical and electronic intrusion was possible in four districts where the grand jury rooms are located along the outside wall of the building. Furthermore, according to the security officers of the Executive Office for U.S. Attorneys and the Administrative Office of the U.S. Courts, some grand jury rooms have such poor soundproofing that persons standing in public areas outside the rooms can easily overhear the proceedings. These conditions create an unacceptably high potential for the secrecy of grand jury proceedings to be compromised and for witnesses to be identified.

One district judge told us that it is only a matter of time before a shootout occurs during a witness transfer to or from the district's grand jury room. Witnesses under the protection of U.S. marshals in that district are unloaded

from vehicles on public streets and have to move through a public corridor to get to the grand jury room. In this same district, a newspaper article contained an account of how a witness in an investigation into political corruption had to take evasive action to avoid contact with the press. The reporter was waiting outside the grand jury room and chased the witness to obtain a statement.

In another district, the press has a waiting room located across the hall from where grand jury witnesses must wait. We saw persons sitting in the hallway on grand jury day and, through discussion with one woman, confirmed that she was a grand jury witness.

In a third district, all witnesses had to enter the building and grand jury room through a public entrance and hallway. Even the names of protected witnesses have been reported in the press because newspeople often wait around the grand jury room when the grand jury meets. In this same district, the grand jury room is located on the outside wall of the building and has many windows. The U.S. attorney agreed optical or electronic intrusion into the grand jury room was possible. In fact, during our audit, someone fired a bullet into the grand jury room. The U.S. attorney said it was most likely a "message" to someone associated with the grand jury.

After our discussions with this U.S. attorney about poor physical facilities, he began corrective action. The building's freight loading area will be modified to allow sensitive grand jury witnesses to be brought into the building secretly. In addition, the grand jury room is being moved, and the hallway to and from the grand jury room will be secured to prevent persons from seeing who comes and goes. Further, additional waiting rooms are being constructed to eliminate the commingling of witnesses.

According to the security officer for the Administrative Office of the U.S. Courts, older courthouse facilities generally do not provide the best security to protect grand jury proceedings. Many grand jury rooms are located next to public areas in the courthouse and have inadequate acoustical qualities. As an example, he said, the grand jury room in a Federal courthouse of a southwestern State is next to a heavily used public corridor where anyone standing outside this room can overhear the proceedings. According to the officer, existing grand jury rooms are

not being evaluated to determine how well they protect the security of grand jury proceedings. He said that problems are discovered only through complaints. For example, soundproofing material was installed in a grand jury room in the Bridgeport, Connecticut, courthouse after a judge complained that the proceedings could be overheard.

The General Services Administration issued guidelines in May 1979 for designing Federal courthouses. The guidelines recognize the need for grand jury secrecy by requiring grand jury rooms to be in a part of the building that is not exposed to heavy public traffic and to be acoustically isolated from adjacent areas. These guidelines, as well as controlling access to the grand jury area, should improve the security of grand jury proceedings in new courthouses.

Grand jury security practices are not routinely audited

The judiciary has not established independent ways for district courts to learn about deficient grand jury security practices in their jurisdictions. We believe the security problems discussed in this chapter show that district courts need to know more about how well the custodians of grand jury materials are protecting the secrecy of those materials. Because district court judges have not had the means to evaluate grand jury security practices, they have tended to rely on the Justice Department to assure that appropriate security procedures and practices are developed and used. The Department, however, has not established consistent security procedures and does not routinely evaluate the grand jury security procedures and practices of its organizational units.

The Justice Department's security officer told us that, under the Department's decentralized approach to maintaining grand jury security, he is merely an advisor to the Department's organizational units. He cannot direct any changes in their security programs, and he evaluates their security practices only at their request.

Furthermore, organizational units in Justice do not routinely evaluate their security practices either. For example, even though 14 organized crime strike forces operate out of 26 different physical locations and are constantly involved with sensitive investigations of organized

crime activities, the Criminal Division's security officer told us that his division does not evaluate the security provisions of organized crime strike force offices. He said he knows of eight or nine offices which have had their security practices evaluated, but these evaluations were conducted at the initiative of the offices.

In addition, even though U.S. attorneys operate out of 160 permanent locations, the space management officer of the Executive Office of U.S. Attorneys, who is also the security officer, told us he has been to less than 40 percent of these locations during his 20 years of experience. He said the main purpose of his visits is to review space management problems, not to evaluate security procedures and practices.

Another problem with the courts' relying on the Justice Department to assure that grand jury security is adequate is that, internally the Department resists the strengthening of security procedures. For example, in early 1977 an order was drafted to improve the control and protection of limited official use information. The proposed order covered unclassified, but sensitive, information--such as grand jury information. The order would have established guidelines for identifying, marking, storing, disseminating, and disposing of such information; however, it was never approved.

In addition, in March 1979 a Department internal audit report 1/ made several recommendations to improve the poor security practices of grand jury court reporters. A departmental order to implement these recommendations was drafted, but the Executive Office for U.S. Attorneys has resisted it. Executive Office officials stated that the proposed security requirements are not required in all cases and might make operating in smaller judicial districts, where there are fewer reporters to choose from, more difficult. They also said that unauthorized disclosures of grand jury information are rarely attributable to reporters. None of their comments have addressed how court reporters' poor security practices could be improved, and their opposition has delayed implementing the order.

Another problem is that judges may not get an independent evaluation of suspected unauthorized disclosures.

1/Acquisition of Litigative Transcripts in U.S. Attorneys Offices, March 1979.

Because no judicial personnel are responsible for following up on such disclosures, judges often must rely on what they are told by Government attorneys and law enforcement agents--persons whose best interest may be not to acknowledge the disclosure. In one district, for example, a newspaper article appeared containing information about sensitive grand jury matters. In an attempt to determine the source of the information, the district's chief judge questioned Government attorneys responsible for the case. They told him the information came from an unknown informant, but definitely not from a Government attorney. A later newspaper article attributed the same information to an unnamed Government attorney. Armed with this article, the judge again contacted the Government attorneys, who denied they were the source of the information, but did not explain why the information was attributed to a Government attorney. Unable to reconcile the matter, the judge let it drop after telling the Government attorneys to tell whoever was talking to stop.

Another indication that Government attorneys and law enforcement agents may not always be candid when discussing disclosures with the courts is that the attorneys sometimes have an incentive to disclose target identities to the press to help generate leads in a case. Several law enforcement officials told us that persons with information about the targets' dealings may step forward when they learn that the Government is investigating the targets.

We believe the judiciary needs to assure that district courts get independent and timely information on the adequacy of the security practices in their jurisdictions. This can be done by having existing Administrative Office of the U.S. Courts' auditors routinely assess the grand jury security practices of court clerks, Government attorneys, law enforcement agents, and court reporters.

CONCLUSIONS

The Federal judiciary, as the supervisor of grand jury proceedings, does not have a program to protect grand jury secrecy. Judges, Government attorneys, and law enforcement officials disagree about what grand jury materials and information must be kept secret under rule 6(e) of the Federal Rules of Criminal Procedure. Some of them apply rule 6(e) in ways that permit the identities of witnesses and targets and the nature of investigations to reach the

public and the press during the duration of grand jury proceedings.

In addition, judges disagree on whether preindictment court proceedings should be closed or open to the public. Such proceedings disclose information that compromises the purposes of grand jury secrecy to the public, the news media, and others when they are held in open court. Furthermore, district judges differ on whether or not grand juror names should be disclosed to the public while the jurors are still impaneled.

Even if the courts, U.S. attorneys, organized crime strike force attorneys, U.S. marshals, and court reporters clearly knew what should be kept secret, their security procedures and practices do not adequately protect grand jury secrecy:

--Security procedures are lax or nonexistent for limiting access to, storing, and disposing of grand jury materials.

--Grand jurors are not usually screened to determine whether they have connections with persons being investigated.

--Grand jury rooms provide inadequate security to keep unauthorized persons from eavesdropping and observing witnesses and jurors.

--Security practices in use in each judicial district are not assessed.

RECOMMENDATIONS TO THE JUDICIAL CONFERENCE OF THE UNITED STATES

We recommend that the Judicial Conference:

--Develop a proposed amendment to rule 6(e), Federal Rules of Criminal Procedure, which more clearly defines what must be kept secret during the duration of grand jury proceedings, including specific guidance for handling (1) preindictment proceedings, (2) grand jury subpoenas, (3) evidence developed independently of a grand jury, but later introduced to it, (4) duplicates and copies of original

documents presented to a grand jury, and (5) internal Government memorandums and other documents that tend to disclose what transpires before a grand jury.

--Review Jury System Improvement Act plans so that the courts and the Department are in a position to react appropriately whenever situations calling for maintaining the confidentiality of grand juror names arise.

--Establish guidelines setting forth the minimum physical security requirements needed to protect the secrecy of grand jury materials.

--Require each custodian of grand jury materials, including court appointed reporters, to establish procedures consistent with the security guidelines and document them in a security plan to be approved by the appropriate district court.

--Provide for periodic audits by the Administrative Office of the U.S. Courts of all custodians of grand jury materials to determine whether they are complying with approved security plans and whether security procedures need to be improved.

--Evaluate the physical security around grand jury rooms and develop an appropriate plan to upgrade and modify deficient facilities to insure that the secrecy of grand jury proceedings will not be compromised.

RECOMMENDATIONS TO THE ATTORNEY GENERAL

We recommend that the Attorney General improve the security practices of U.S. attorneys, organized crime strike forces, U.S. marshals, and court reporter personnel by developing and issuing interim security guidelines until the Federal judiciary establishes official security requirements. We also recommend that the Attorney General require U.S. attorneys and organized crime strike force attorneys to routinely screen grand jurors for possible conflicts of interest with cases to be presented to the grand jury by reviewing the grand juror qualification questionnaires.

CHAPTER 3

AGENCY COMMENTS AND OUR EVALUATION

The Federal judiciary, the chief judges in six of the seven judicial districts we visited, and the Department of Justice commented on this report. One chief judge did not provide us with any comments. Members of the judiciary and the chief judges basically agreed with this report. The Department of Justice's comments are difficult to characterize. On the one hand the Department said that on the whole, the report contributes to the improvement of grand jury procedures. At the same time the Department said that the report distorted the problems of grand jury secrecy. We strongly disagree with this latter statement and believe that the Department's comments contain misconceptions and confuse the basic message of the report.

FEDERAL JUDICIARY

A special subcommittee consisting of members from the Judicial Conference Committee on the Operation of the Jury System and the Advisory Committee on Criminal Rules studied the draft of our report. (See App. III.) The Chairman of the Jury Operations Committee, speaking for the judiciary, expressed concern about the grand jury security issues raised. He said both judicial conference committees would consider the report's findings, conclusions, and recommendations in their July 1980 meetings. Subsequently, an official of the Administrative Office of the U.S. Courts told us that the draft report was considered during the July meetings. He said that both committees believe that the issues raised in the report deserve additional study and that subcommittees have been appointed to evaluate the issues and recommend to the full committees what actions should be considered by the Judicial Conference.

DISTRICT COURT CHIEF JUDGES

The chief judges in six of the seven districts we visited were in general agreement with the overall message of the report. One judge obtained the views of the U.S. attorney for his district. The U.S. attorney said, and the judge concurred, that the reforms suggested in our report were positive in nature and intended to improve the security of the grand jury system. He pointed out that before funding is provided, many measures can be taken to improve grand jury security. He said that his office can establish detailed guidelines for handling grand jury matters and he could

--have all assistants keep tight control over all grand jury materials and transcripts by locking them in file cabinets at the end of the day;

--perform a security check of all grand jury reporters and typists who work for grand jury reporters;

--give grand jury witnesses detailed instructions prior to their appearance on how to obtain entrance to the grand jury room without their identities being compromised; and

--tell other agencies who take custody of grand jury records that they must keep them in a separate place outside the agency's general files and must return them to the United States attorney as soon as they are finished with them.

He concluded by saying that the court should (1) set forth an order detailing those matters which are to be kept secret and sealed; (2) make fuller inquiries into the backgrounds of grand jurors before empaneling them; and (3) require security checks of all prospective grand jurors in the form of name checks for prior convictions. This attorney added that he believes that grand jury material should be basically defined as any document, testimony, or other evidence that was obtained through the grand jury process and also any proceedings relating to grand jury investigations except for contempt proceedings.

Other concerns and comments expressed by the chief judges follow.

--Concern was expressed that implementing many of the reforms suggested would cause considerable problems from a space management and funding standpoint. Changes in the use of space would be required to provide a secure entrance to the grand jury room and a separate waiting room for grand jury witnesses.

We agree that in some districts funds will be needed for major space modifications and other security provisions. As the above noted U.S. attorney comments indicate, however, common sense actions can be taken which will improve security until such time funding becomes available. We believe, however, that the judiciary and the Justice Department will need to identify and prioritize space-related problems so that they can obtain the necessary funds to secure grand jury rooms, provide proper storage for grand jury materials, and provide appropriate protection to grand jurors and grand jury witnesses.

--Concern was expressed that investigative agencies should not be custodians of grand jury records and that grand jury proceedings not be "overregulated" by security procedures.

In view of this concern, the Judicial Conference may wish to consider whether investigative agencies should continue to be custodians of grand jury materials. Our position is that no matter who the custodians are they should clearly understand what material is to be protected and have appropriate security procedures to prevent unauthorized disclosures. The approach we have recommended to improve the security over grand jury material should not be burdensome and we believe it is grounded in common sense. Our work clearly shows that many of those who handle grand jury materials do not take precautions to secure them. Accordingly, we have recommended that the Judicial Conference take steps to clarify what information should be kept secret and set forth minimum security requirements and require custodians of grand jury materials to document the specific procedures they will use to meet the requirements. We believe this will immediately create an institutional environment more sensitive to grand jury security needs while giving those who have to protect the materials the opportunity to develop security procedures which will not be overly burdensome.

--It was noted that besides rule 6(e), rule 41, Federal Rules of Criminal Procedure, dealing with physical evidence within the possession of the grand jury, should be amended so that search warrants and accompanying affidavits are kept secret from the public until an indictment is returned.

We did not evaluate the implications of rule 41 in revealing grand jury matters prior to indictment, however, the Judicial Conference may wish to consider the ramifications of this rule in maintaining the secrecy of grand jury proceedings.

--Concern was expressed that our report overemphasized the extent of security problems attributable to individual districts because not each and every district had the gambit of shortcomings described in the report.

While variances existed, and some districts' security practices were sound in some aspects, each district had a number of the shortcomings discussed in this report.

DEPARTMENT OF JUSTICE

The Department of Justice expressed a mixture of views that are difficult to reconcile. On the one hand they said that:

--The report contains some constructive criticisms and, on the whole, contributes to the improvement of Federal grand jury proceedings.

--The Department wholeheartedly endorsed the thrust of the report in its aim to strengthen safeguards for grand jury proceedings.

--The incidence of genuine breaches of grand jury secrecy had increased in recent years and that improved security measures could reduce inadvertent breaches of secrecy.

--As a principle, it is a matter of fundamental importance to the criminal justice system that grand jury proceedings be kept secret to the fullest practicable extent.

The Department cited a number of actions it has underway or under study in response to our report.

At the same time, the tone of the Department's letter would lead a reader to believe that the Department wholeheartedly disagreed with our report. The Department maintained that the report distorts the problems attending grand jury secrecy; exaggerates the incidence of secrecy breaches; narrowly focuses on the principles underlying grand jury secrecy to the derogation of competing legal principles; and, advocates sweeping changes to judicial procedures that have withstood the test of time on the basis of less than reliable data. Each of the Department's specific criticisms, with which we strongly disagree, are discussed below. Overall, we believe the Department's comments contain misconceptions and confuse the basic message of the report.

The underlying premise of the report is that although law enforcement and judicial officials believe secrecy is important for the fair and effective use of the grand jury, no program exists to protect the secrecy of grand jury proceedings. As a result the purposes of the secrecy rule are not being accomplished. We believe that if secrecy is important, action must be taken to implement rules and methods designed to prevent disclosures about ongoing grand jury proceedings.

The Department uses two basic arguments to support its criticism. First, the Department states that the report narrowly focuses on the principles of grand jury secrecy to the derogation of other competing legal principles. Second, the Department asserts that our disclosure statistics exaggerate the incidence of security breaches.

Grand Jury Secrecy and Other Competing Legal Principles

The Department states that the chief deficiency of the report is its narrow focus on the principles underlying grand jury secrecy to the derogation of competing and often more compelling legal and constitutional principles set out in the large and growing body of case law on grand jury secrecy. The Department cites four specific cases related to this matter. The Department contends the report assumes that the system for protecting the secrecy of grand jury proceedings should be achieving a degree of secrecy higher than legally permissible or practically attainable. The competing legal principles discussed in their response are that

--no obligation of secrecy may be imposed on a witness who appears before a grand jury,

--serious constitutional questions exist about whether judicial proceedings that arise ancillary to grand jury proceedings can be conducted in secret over the objection of any party thereto even in light of a recent Supreme Court case, and

--some disclosures of grand jury transcripts are required if a defendant is to have a fair trial.

Our evaluation of these issues indicates that the Department misunderstood our report. Our report is strictly concerned with disclosures occurring during the preindictment phase of grand jury proceedings. The competing principles the Department cites generally come into play only after an indictment has been returned by the grand jury. For example, the cases cited by the Department on page 56 of this report are not relevant to the types of disclosures discussed in this report. Each of these cases is concerned with court ordered disclosures after an indictment has been returned or a grand jury has retired. As stated before, our report is concerned with disclosures occurring before indictments are returned not after indictments are returned.

This same flaw exists with the Department's comment about the disclosure of grand jury transcripts (recorded witness statements and exculpatory evidence) under the Jencks Act (18 U.S.C. 3500) and the Due Process Clause pursuant to Brady v. Maryland (373 U.S. 83 (1963)). The Brady case and Jencks Act disclosures both occur in the period following indictment or after the grand jury retires without returning an indictment. Again our report is concerned only with the preindictment phase of grand jury proceedings not the post indictment phase.

Regarding the Department's comments that grand jury witnesses are under no obligation of secrecy and are the source of most disclosures, we recognized that witnesses are not obligated to secrecy on pages 2 and 13 of our report. Nevertheless, this fact in no way invalidates the message of this report. The conclusions and recommendations of this report were developed with the understanding that witnesses are not obligated to secrecy.

Basically there are five possible sources of information about grand jury proceedings

--grand jury witnesses,

--preindictment ancillary proceedings,

--post indictment proceedings,

--lax security conditions, and

--deliberate disclosures.

We recognize that disclosures occurring through grand jury witnesses and post indictment proceedings are grounded in constitutional principles and cannot be controlled. However, the remaining sources of disclosures are under some degree of control by the Government. The finding of this report is that presently little control exists to prevent such disclosures from occurring.

Our data also shows that the Department's contention that witnesses are the source of most of the disclosures in this report is not accurate. Other than its assertion, the Department provided no details and has no details to substantiate its claim. As shown on page 45 of this report, we identified that 407 of the 492 disclosures came from sources other than witnesses. There were 85 disclosures which the source of the disclosure was unknown. Some or all of these could have come from witnesses. However, no one knows. To help us validate that the information in news articles came from Government sources, rather than witnesses, we discussed 67 of the articles with either Government attorneys, agents or judges. The following table summarizes their opinions about the source of the information in these articles.

Source of disclosures	Number of disclosures
Government attorneys and agents	46
Public documents and proceedings	6
Inadequate physical facility	13
Unknown	2
	67

The final legal principle the Department discusses involves disclosures coming from ancillary proceedings and the recent Supreme Court rulings regarding closure of pretrial proceedings. Contrary to the Department's comments, the report clearly recognizes that judicial proceedings ancillary to grand jury proceedings can and do result in information being made public. As pointed out on pages 8 through 13 and page 45, such proceedings are a major source of information which can compromise the purposes of grand jury secrecy.

The Department further states that we would apparently have all proceedings conducted in secret. We do not agree. We have simply pointed out that Federal judges differ on whether such proceedings should be closed or open under rule 6(e) and that considerable information which compromises the purposes of secrecy is divulged during these open proceedings. We believe the Federal judiciary needs to act to reduce the disparate practices currently in place.

We commend the Department's efforts to develop guidelines governing the circumstances in which the Government will seek closed proceedings. However, we see this as only an interim measure which prosecutors can take to improve grand jury security. In the final analysis, we believe the judiciary, as supervisors of the grand jury, should specify through a proposed amendment to rule 6(e) how various preindictment proceedings should be handled. Our recommendation to the Judicial Conference is based on our belief that to the extent that such proceedings can be closed, without sacrificing other legal principles, less information which compromises the purposes of grand jury secrecy will be available to the public, the news media, and the targets of investigations.

Furthermore, we believe our discussion of the Gannett Co. v. De Pasquale court case demonstrates our understanding and concern for legal principles which compete with grand jury secrecy. In this regard, we take specific exception to the Department's comment that we do not make clear that Gannett only stands for the proposition that a pretrial hearing may be conducted in camera where all parties agree. On page 12, we stated

> "The [Supreme] Court concluded that if the trial judge and all parties to the pretrial hearing agree, the hearing may be closed when necessary to assure a fair trial and to avoid prejudicial publicity." (Underscoring supplied.)

The Department concludes by saying that the proper course to follow in dealing with grand jury secrecy is to reduce avoidable and inadvertent breaches of grand jury secrecy which serve no policy purpose and to prosecute vigorously any conscious and improper violations of grand jury secrecy, recognizing that absolute secrecy is neither possible nor desirable. We fully concur in this view, but as our report points out, an adequate security program does not now exist to carry out these objectives. Accordingly, we believe our report identifies specific areas where breaches can be avoided by clarifying what should be kept secret and the report proposes a systematic approach to accomplish the long accepted valuable purposes of grand jury secrecy.

Validity of Disclosure Statistics

The Department also states that our statistics are misleading and exaggerate the incidence of secrecy breaches. To substantiate this belief it contends that

--we had privileged access to court records and judicial proceedings;

--the disclosures we identified mainly came from witnesses or other proper sources;

--we used an unprecedented and too broad a definition of grand jury information; and,

--we did not provide sufficient detail to enable the reader to determine the seriousness, context, source and type of information disclosed.

Contrary to the Department's assertions, we believe our statistics are reliable, indicative of a significant problem and do support the need for major improvements to protect the secrecy of grand jury proceedings during the preindictment stage.

Privileged access to records

The Department discounts the validity of our statistics by contending we identified over 200 disclosures because of special access to information. We strongly disagree with this statement, as the court records we obtained were available to any member of the public. We had no special access to grand jury records and information.

Sources of disclosures

Throughout its comments, the Department states we should identify whether our disclosures came from either proper (legitimate) or improper (illegitimate) sources. The Department's contention appears to be that any compromise of grand jury secrecy coming from "proper" sources are uncontrollable and that most of our disclosures are from proper sources, i.e., witnesses and judicial proceedings. This comment indicates further that the Department misunderstood this report. The basic message of the report is that the grand jury secrecy rule exists to accomplish certain purposes and that these purposes are not being fulfilled because information controllable by the Government is available to the public and others prior to indictment. In this context, the issue of the propriety of disclosures is meaningless. Indeed, our report recognizes, on pages 8 to 13, that many disclosures occur because of disparities in judicial practices and are proper or legitimate in that the disparities are allowable under existing laws and procedures. Our recommendations are designed to provide clearer guidance to judicial officers and others so as to reduce those disparities and better control the availability of grand jury information. More than once in its response the Department states that grand jury witnesses are not obligated to secrecy and that it believes most of the disclosures in our report resulted from information furnished by grand jury witnesses.

The Department's comments provide no basis about why it believes most disclosures came from witnesses. We heard this same comment throughout our review to explain away any questionable disclosures we identified, however, we never saw any proof to substantiate this claim.

While we agree that witnesses are a possible source of information, witnesses were not the likely source of the disclosures identified in this report. The table below identifies the sources of information and the ways we used to determine the sources of the disclosures.

WAYS USED TO DETERMINE DISCLOSURES

Disclosure occurred through	Total	Review of news reports	Interviews with attorneys, agents, or judges	Direct observation	Review of documents or court proceedings
Witnesses	0	0	0	0	0
Grand jurors	2	0	2	0	0
Court reporter	4	0	3	0	1
Gov. attorney/agent	85	52	13	4	16
Public document/ proceeding	292	25	2	3	262
Inadequate security provision	24	7	3	14	0
Unknown	85	75	1	0	9 a/
	492	159	24	21	288

a/We determined these disclosures from a public FBI affidivat and two internal district court memorandums which showed that targets had determined the names of grand jury witnesses and their specific testimony, but did not show how the disclosures occurred.

As shown in the table, witnesses were not the source of the disclosures in any case we confirmed. The 85 disclosures which we could not attribute to a particular source could have come from any of the sources shown in the table, including witnesses. Furthermore, the Department's argument fails to recognize one critical element related to witnesses discussing their grand jury roles and observations. That is, it is not necessarily in a witness's best interest to publicly reveal his role and identity, particularly if he is cooperating with the grand jury. Thus, while witnesses can and probably do reveal information about grand jury proceedings, we cannot accept the Department's broad generalization that witnesses are the source of "most" of the disclosures identified in this report.

The table on page 45 also addresses the Department's concern about how many of our disclosures were from proper and improper sources. It shows that 292 disclosures came from public documents and proceedings and could be considered legitimate. However, another 115 disclosures came from sources that could be considered illegitimate. In the remaining 85 cases, we could not determine the sources of the information and would agree with the Department that these could have come from witnesses.

Definition of a disclosure

Because a clear definition of grand jury information does not exist, criteria was necessary to enable us to perform our evaluation. Thus, for our purposes of evaluation, we used the underlying purposes of grand jury secrecy as our criteria to determine how well the essential design of rule 6(e) was being carried out in the period preceding indictment. Accordingly, we defined "grand jury information" as any information the disclosure of which could compromise one of the purposes of grand jury secrecy as stated by the Supreme Court. We believe this provided a reasonable starting point for us to evaluate whether this information and/or documents we obtained through sources such as public judicial proceedings, public court files, and newspaper articles comprised the secrecy objectives.

We defined a "disclosure" as grand jury information which became or could have become available to the public or someone else through sources controllable by the Government before indictment. We specifically excluded disclosures of information which reasonably could be attributed to witnesses. Thus, whenever information was revealed contrary to a purpose of secrecy, we considered it a disclosure of grand jury information. This included the identification of witnesses, targets, and the nature of investigations. We believe this was the best approach and it clearly shows that improvements in grand jury operations are needed if the intended purposes of secrecy are to be achieved.

Disclosure perspective and seriousness

The Department states that our disclosures are not placed in perspective. It notes that the incidents in our

report occurred over a period of six fiscal years. During this period they state that

--numerous proceedings were conducted,

--over 1 million grand jury subpoenas were issued, and

--about 3,700 grand juries with more than 85,000 grand jurors were active.

Finally, the Department states that the report does not provide adequate information about the seriousness of the various disclosures.

In the first place, we simply used the 492 "disclosures" to indicate that information which compromises the purposes of grand jury secrecy, as articulated by the Supreme Court, is readily available to the public, the news media, and even targets of investigations during the preindictment stage of grand jury proceedings. There is nothing sacred about the number 492. We merely stopped counting at that point because we believed this number of "disclosures" was sufficient to demonstrate that information about ongoing grand jury proceedings was being disclosed.

Nevertheless, to address the Department's concern, the following table defines the time frames and districts covered by our disclosures.

Year	Total	From seven districts visited	From other districts
1979	223	180	43
1978	105	91	14
1977	39	36	3
1976	53	50	3
1975	33	29	4
1974	15	15	-
1973	24	20	4
	492	421	71

As the previous table demonstrates, 328 or 67 percent of the total identified disclosures occurred during two fiscal years (1978 and 1979). Further, 421 of the 492 disclosures were identified in the seven districts we visited. Also, as stated in chapter 2, we documented multiple instances where disclosures involved murder, intimidation, and disappearance of witnesses; persons who had their reputations damaged; and investigations that had to be dropped or delayed. As a result of the above, we believe we have conclusively demonstrated the severity of the problem and the need for Justice and the judiciary to take positive steps to improve the security of grand jury proceedings.

General Comments by the Department

Overall, the Department states it is committed to grand jury secrecy and cites an excerpt from its United States Attorneys' Manual on the subject to demonstrate this commitment. Based on past and present Department actions, we question the strength of this commitment. Citing one small excerpt from a manual falls far short of sufficient evidence to demonstrate a strong security commitment, particularly in view of the many questionable security practices we found in Department facilities. As discussed on pages 30 and 31, the Department had no program to monitor and evaluate the security practices used by its personnel.

A good example of this "commitment" is found by analyzing the Department's actions to tighten security controls employed by court reporters. On pages 64 and 65 of this report the Department states its security specialists have long recognized the need for improved security measures by Federal prosecutors and court reporters who transcribe grand jury proceedings. The Department states that a draft order establishing minimum national security standards has been developed and will be issued shortly. The Department states that, generally, the order will establish uniform procedures for requesting, processing, and adjudicating security clearance for court reporters and Department personnel.

What the Department fails to say is that similar draft Department orders have existed in several forms for over 3 years. During discussions with Department officials in March 1980, they told us a draft order would be issued shortly. The Department's June 27, 1980, letter commenting on this report makes a similar comme . As of August 7, 1980,

this order was still in draft and surrounded in controversy. The Executive Office of U.S. Attorneys has still not favorably commented on this draft just as it had not with the other previous draft orders. We believe a strong Department commitment would not have allowed this situation to go unresolved for so long.

On August 5, 1980, we also attempted to verify two other statements made by the Department in its June 27, 1980, letter commenting on our draft report. (See p. 62.) The Department said it has directed and urged Federal prosecutors who practice in districts which follow an open proceeding rule or maintain grand jury subpoenas among public records to

--apply for in camera proceedings in all appropriate cases; and

--discuss with the chief judge of the district the possibility of maintaining such subpoenas among sealed records, at least until the indictment has been returned.

Two weeks later the Department provided us with a memorandum dated August 6, 1980, containing these instructions. (See appendix V.)

APPENDIX I

OFFICES REVIEWED BY GAO

	District court clerk	Court reporters	U.S. attorney	Organized crime strike force	FBI	DEA	U.S. Marshals Service	IRS
Western Washington (Seattle)	x	x	x	(b)	x	x	x	x
Nevada (Las Vegas)	x	x	x	x	x	x	x	x
Western Missouri (Kansas City)	x	x	x	x	(c)	(c)	x	(c)
Eastern Missouri (St. Louis)	x	x	x	(b)	x	x	x	x
New Jersey (Newark)	x	x	x	x	x	x	x	x
Southern New York (Manhattan)	(a)	x	x	(b)	x	x	x	x
Eastern New York (Brooklyn)	x	x	x	x	x	x	x	x

a/We were only able to evaluate certain clerk of the court grand jury security provisions because the chief judge subsequently denied us access to court officials.

b/Organized crime strike forces are not located in these cities.

c/Because of the better security practices and procedures of the FBI, DEA, and IRS, we did not visit offices of these agencies in this city.

APPENDIX II

DOCUMENT COMMONLY FOUND IN PUBLIC FILES WHICH REVEALS WITNESS AND TARGET IDENTITIES

United States Department of Justice
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
WASHINGTON, D.C. 20530

MAY 21 1979

Honorable B. Mahlon Brown
United States Attorney
District of Nevada
Las Vegas, Nevada 89101

Attn:
Assistant United States Attorney

Re: Grand Jury Investigation,
(TARGET) Company, et al.

Dear Mr. Brown:

Pursuant to the authority vested in me by 18 U.S.C. 6003(b) and 28 C.F.R. 0.175(a) I hereby approve your request for authority to apply to the United States District Court for the District of Nevada for an order pursuant to 18 U.S.C. 6002-6003 requiring to give testimony or provide other information in the above matter and in any further proceedings resulting therefrom or ancillary thereto.

Sincerely,

P. Heymann

Philip B. Heymann
Assistant Attorney General
Criminal Division

APPENDIX II

DOCUMENT COMMONLY FOUND IN PUBLIC FILES WHICH REVEALS WITNESS AND TARGET IDENTITIES

UNITED STATES DISTRICT COURT

-o0o-

IN RE: GRAND JURY PROCEEDINGS)
)
WITNESS:)
)

Misc. No. _____

ORDER TO COMPEL TESTIMONY AND PRODUCE INFORMATION

On motion of United States Attorney for the District filed in this matter on May 30, 1979;

And it appearing to the satisfaction of the Court:

1. That (WITNESS) has been called to testify or provide information before the Grand Jury of the United States presently empanelled within this District; and

2. That the said (WITNESS) has refused to testify or provide other information on the basis of his privilege against self-incrimination; and

3. That in the judgment of the said United States Attorney, the testimony or other information from said (WITNESS) may be necessary to the public interest; and

4. That the aforesaid Motion filed herein has been made with the approval of the Assistant Attorney General in charge of the Criminal Division of the Department of Justice, pursuant to the authority vested in him by Title 18, United States Code, Section 6003(b), and Title 28, Code of Federal Regulations, Section 0.175(A).

DOCUMENT COMMONLY FOUND IN PUBLIC FILES WHICH REVEALS WITNESS AND TARGET IDENTITIES

NOW, THEREFORE, IT IS ORDERED that the said (WITNESS) give testimony or provide other information which he refuses to give or to provide on the basis of his privilege against self-incrimination as to all matters about which he may be interrogated before said Grand Jury, and all further proceedings resulting therefrom or ancillary thereto.

IT IS FURTHER ORDERED that no testimony or other information compelled under this Order, or any other information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the Order of this Court.

DATED: _____

_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
P. O. Box 013009
Miami, Florida 33101

C. Clyde Atkins
Chief Judge

May 29, 1980

Mr. Allen R. Voss
Director
United States General Accounting Office
Washington, D. C. 20548

Re: Draft of Proposed Report - "More Guidance Needed on Securing Federal Grand Jury Proceedings"

Dear Mr. Voss:

A subcommittee consisting of members from the Judicial Conference Committee on the Operation of the Jury System and the Advisory Committee on Criminal Rules has studied the above report. As a result we are concerned about the issues which the report raises about the security of grand jury operations in the Federal Courts.

The subcommittee has recommended, and I concur, that no objection be made to the release of the report in its present form. However, in keeping with the subcommittee's proposal, the recommendations in the report, appropriate to its jurisdiction, will be considered by the Jury Committee at its next scheduled meeting in July. I understand also that the Advisory Committee on Criminal Rules will likewise consider those portions of the report relating to its jurisdiction at its meeting this summer. The Committees will then make any recommendation to the Judicial Conference for its consideration.

I would respectfully request that the Report as ultimately released might be made to reflect that its contents have been considered by the judiciary and that the appropriate committees of the Judicial Conference plan to take further action with respect to its proposals, as outlined above.

Judge Hoffman and I, for our respective committees, express appreciation for the opportunity to review this draft report prior to its contemplated release.

Sincerely yours,

C. Clyde Atkins

CCA:dm
cc: Honorable Walter Hoffman
All Members of the Jury Operation Committee
Honorable Clifford S. Green
Honorable Joseph Tauro
Richard Green, Esq.
Leon Silverman, Esq.
Bill Burchill, Esquire
Professor Wayne LaFave

U.S. Department of Justice

Mr. William J. Anderson
Director
General Government Division
United States General Accounting Office
441 G Street, N.W.
Washington, D. C. 20548

JUN 27 1980

Dear Mr. Anderson:

This letter is in response to your request to the Attorney General for the comments of the Department of Justice (Department) on your draft report entitled "More Guidance Needed On Securing Federal Grand Jury Proceedings."

The draft report compiles instances in which the General Accounting Office (GAO) believes that grand jury secrecy has been breached, analyzes the various "disclosures" identified, and offers recommendations for protecting the secrecy of grand jury proceedings. Overall, the GAO report contains some constructive criticisms and, on the whole, contributes to the improvement of federal grand jury procedures. Unfortunately, however, the report also distorts the problems attending grand jury secrecy and exaggerates the incidence of breaches of secrecy. The report assumes that the system for protecting the secrecy of grand jury proceedings should be achieving a degree of secrecy higher than that which is legally permissible or practicably attainable. In any event, the Department is in the process of developing more stringent security controls over grand jury materials and is studying some of the problems raised by the report, such as the difficult issue whether or to what extent ancillary judicial proceedings should be open or closed to the public.

GRAND JURY SECRECY IN GENERAL

The Department's commitment to grand jury secrecy is stated in the United States Attorneys' Manual:

> It is a matter of fundamental importance to the criminal justice system . . . that grand jury proceedings should be kept secret to the fullest practicable extent. (U.S.A.M., 9-11.360)

While we wholeheartedly endorse the thrust of the report in its aim to strengthen safeguards for grand jury proceedings, we are disappointed that the report is, in our view, misleading in many respects.

For at least two hundred years before the Fifth Amendment was ratified, the principle of grand jury secrecy was firmly established in the British common law. The tradition was followed in the United States and has been embodied in Rule 6(e) of the Federal Rules of Criminal Procedure which provides in pertinent part:

> (2) General Rule of Secrecy. -- A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

We believe that the chief deficiency of the report is its narrow focus on the principles underlying grand jury secrecy to the derogation of competing principles set out in the large and growing body of case law on grand jury secrecy; e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Proctor & Gamble, 356 U.S. 677 (1958); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959); Douglas Oil Co. v. Petrol Stops Northwest, __U.S. __, 60 L. Ed. 2d 156 (1979). As will be set out more fully below, the report views grand jury secrecy as an absolute which exists in a vacuum rather than as a legal principle which must be balanced against competing and often more compelling legal and constitutional principles. Because there are situations in which disclosure of grand jury transcripts or minutes is required or authorized by law, the report should, but does not indicate whether each of the "disclosures" it identifies was from a proper or improper source. We believe that most of these "disclosures" resulted from information furnished by grand jury witnesses who are under no obligation of secrecy, or were derived from other legitimate sources. Because the justification for the recommendations in the report rests on the "disclosure" statistics, those statistics should be highly reliable if they are to support the sweeping changes advocated to judicial procedures which have been developed by British and American courts over the more than four centuries during which the principle of grand jury secrecy has been in force.

ANALYSIS OF STATISTICS

In our view, the data developed in the report do not justify such a result. The report's statistical base consists of an undifferentiated mass of largely meaningless figures taken primarily from public press reports and from GAO observations of court records and judicial proceedings. Approximately half of the "disclosures," more than 200, are based on news articles collected by GAO from newspapers throughout the country which contain information about grand jury activities. Although in some cases these represent genuine breaches of grand jury secrecy, including at least two instances in which the individuals responsible for the improper disclosures were convicted for their actions and several famous instances of "leaks," in most instances it is impossible to determine whether journalists obtained information from a legitimate or illegitimate source. More than 200 of the other "disclosures" reported by GAO consist of observations by GAO auditors based on reviews of court files and judicial proceedings in the districts reviewed. The overwhelming majority of these instances involve what would more accurately be described as "potential disclosures" as there is no evidence that persons other than court personnel and GAO auditors were privy to the information in question.

When GAO reports that it has identified 492 "disclosures" of "grand jury information," GAO is seriously overstating the significance of its statistics. By way of analogy, GAO's figures might be compared to a hypothetical situation in which an audit is performed on a bank known to have been robbed several times. Assume that the auditors know only, (1) that they were able, due to their special access to bank facilities, to carry out more than 200 hypothetical "robberies" of the bank which might have been perpetrated by criminals, and (2) that they have received more than 200 reports that money from the bank was being circulated without knowing whether that money had been stolen or withdrawn from the bank by depositors. Given these two facts, it would be grossly misleading to report that more than 400 robberies had been identified. Yet GAO's report of 492 "disclosures," based as it is on information of a similar nature, is almost as misleading.

In addition to this fundamental flaw in the GAO statistics, there are more specific defects. First, the report adopts an unprecedented definition of "grand jury information"

which encompasses grand jury subpoenas, the identity of grand jurors, pleadings filed in connection with motions to quash or enforce grand jury subpoenas, pleadings in connection with habeas corpus proceedings, grants of witness immunity, and virtually any item of information presented to a grand jury. As noted above, the definition of "disclosure" is so broad as to include potential disclosures of information.

Second, the "disclosures" of "grand jury information" are not placed in perspective. The report does not explain, for example, that the incidents reported occurred over a period of at least six fiscal years (1974-79), that 134,229 federal grand jury proceedings were conducted during that period (Department of Justice Annual Reports), that more than one million grand jury subpoenas were issued in connection with those proceedings (United States Marshals Service estimate), or that the reporting period covers the activities of approximately 3,700 federal grand juries comprised of more than 85,000 grand jurors (Administrative Office of the United States Courts).

Third, the statistics do not differentiate as to the stage of the grand jury proceedings during which the "disclosure" occurred, the type of grand jury proceeding involved, the extent or substance of the "information" revealed, or the identity of the person to whom disclosure was made. As a result, it is impossible to determine the seriousness of the various "disclosures." Generally, there are two categories of "recipients" of grand jury information--the media and targets, or those in alliance with them. Their interests in obtaining such information are usually very different. The target wants to know the status of the investigation, what evidence and witnesses the Government has, and what evidence or witnesses the Government has not discovered. Armed with this information, the target may, if so inclined, attempt to hide or destroy physical evidence or persuade or pressure witnesses to take the Fifth Amendment, move to quash subpoenas, change stories, or disappear. In short, grand jury information enables a target to frustrate or obstruct the grand jury investigation.

The media representative on the other hand, is ordinarily concerned with obtaining a story, and probably does not consciously intend to frustrate or obstruct the investigation. Unfortunately, dissemination of the story to the public generally means that the target also receives the information. The target is then in a position to take steps adverse to the investigation as described above.

Some of the types of information which may be disclosed are:

(a) Name(s) of target(s)
(b) Nature of investigation(s)
(c) Name(s) of witness(es)
(d) Nature of testimony
(e) Particular witness(es) claim of constitutional privilege(s)
(f) Description and content of subpoenaed document(s)
(g) Indictment(s) will be handed down at a certain time

The potential "sources" of grand jury disclosures are manifold. They include:

(a) Witnesses
(b) Grand jurors
(c) Court reporters
(d) Government attorneys/agents
(e) Public documents/proceedings (e.g., motions to enforce/quash a subpoena, immunity proceedings, contempt proceedings)
(f) Inadequate security provisions (e.g., witnesses must walk through public corridors, inadequate soundproofing of grand jury rooms, poor storage/disposal techniques)

Again, the report makes no effort to differentiate or classify the various "disclosures" it has identified. As a result, the report adds little to the existing body of information about breaches of grand jury secrecy.

Despite these weaknesses, the GAO figures do make the point that breaches of grand jury secrecy occur and serve to focus attention on several ways in which some aspects of grand jury proceedings have become public knowledge. In this regard, the Department does believe that the incidence of genuine breaches of grand jury secrecy has increased in recent years, largely a function of the priority which has been assigned to prosecution of public corruption, fraud, organized crime and narcotics trafficking. Not only are these proceedings of significant public interest and the subject of affirmative efforts by the news media to determine what is transpiring, they also involve highly complex issues requiring grand jury investigations which may run for months and result in the testimony of dozens of witnesses and the production of records by numerous record custodians. The prospects for maintaining absolute secrecy as to all such proceedings are remote and would continue to be even if all the measures advocated by GAO were in place.

GRAND JURY SECRECY NOT ABSOLUTE

As the draft report briefly notes, some disclosures of grand jury proceedings are unavoidable under existing law. The report does not, however, reflect the true nature of or policy reasons for such legitimate disclosures.

First, because no obligation of secrecy may be imposed upon a witness who appears before the grand jury, a witness may legitimately reveal all information to which he or she has access, including the grand jury subpoena received, his or her testimony, questions propounded by the prosecutor or grand jurors, any documents or physical evidence he or she was asked to examine for purposes of identification or explanation, and any other facts that come to the attention of the witness before, during, or after his or her testimony. The authors of the Federal Rules of Criminal Procedure felt that it would be unduly harsh, if not a violation of constitutional rights, to impose an obligation of secrecy on grand jury witnesses. Despite the best efforts of prosecutors and courts, therefore, any key grand jury witness can legitimately reveal substantial information about a grand jury proceeding.

Second, numerous judicial proceedings arise ancillary to grand jury proceedings: witnesses file motions to quash grand jury subpoenas, prosecutors file motions to enforce grand jury subpoenas and applications for immunization of witnesses, subjects of grand jury proceedings who have been arrested and bound over for grand jury proceedings may file habeas corpus proceedings seeking release from custody, and individuals disobeying court orders are tried for contempt. While the report would apparently have all of these proceedings conducted in secret, there are serious constitutional questions, even in light of Gannett Co., Inc. v. Depasquale, 99 Sup. Ct. 2892 (1979), whether such proceedings could be conducted in secret over the objection of any party thereto. The Department is currently developing guidelines governing the circumstances in which the Government will seek closed proceedings. In this regard, we recognize that any rigid rule of secret proceedings, without regard to the need therefor, raises constitutional questions. The report does not make clear, for example, that Gannett only stands for the proposition that a pretrial hearing may be conducted in camera where all parties agree. The report does not mention that Gannett was a five-to-four decision in which an eloquent dissent was filed speaking of secret proceedings as a menace to liberty and highlighting the importance of open judicial proceedings to safeguard against courts being employed as instruments of persecution.

In addition, some disclosures of grand jury transcripts are required if a defendant is to have a fair trial and effective assistance of counsel. The Jencks Act, 18 U.S.C. 3500, for example, requires that the Government produce any prior recorded statement by a government witness, specifically including grand jury testimony, 18 U.S.C. 3500(e)(3). Further, the Due Process Clause requires the Government to produce evidence favorable to the accused upon request, Brady v. Maryland, 373 U.S. 83 (1963); this includes evidence developed by a grand jury. Rule 16 of the Federal Rules of Criminal Procedure gives a defendant a right to inspect the transcript of his testimony before a grand jury as well as any documents, tangible objects, and reports of examinations and tests presented to a grand jury. Rule 6(b) of the Federal Rules of Criminal Procedure and 28 U.S.C. 1867 authorize defendants to challenge the array of a grand jury or any particular grand juror. Obviously, no meaningful challenge could be mounted unless the defendant can learn the identities of the grand jurors.

Given these entirely proper methods by which grand jury proceedings may come to public attention, some of which are constitutionally mandated, absolute secrecy of grand jury proceedings is an impossibility. The proper course, therefore, is to endeavor to reduce avoidable and inadvertent breaches of grand jury secrecy which serve no policy purpose and to prosecute vigorously any conscious and improper violations of grand jury secrecy recognizing that absolute secrecy is neither possible nor desirable.

SPECIFIC GAO RECOMMENDATIONS

With respect to the various recommendations of the report, our comments and proposed actions are as follows:

1. Judicial Proceedings Ancillary to Grand Jury Proceedings

As the report observes, policies vary among the different districts as to whether such proceedings should be closed. From a purely prosecutorial viewpoint, the Department would favor a rule that such proceedings should generally be closed, but we recognize and respect the common law rule of open judicial proceedings alluded to above and would be reluctant to support any rigid national requirement of closed judicial proceedings.

It should be noted that federal prosecutors often apply for closed or in camera proceedings where there is some demonstrable reason to believe that an open hearing might result in flight from prosecution; harm to any person;

tampering with evidence, witnesses or jurors; or a significant breach of grand jury secrecy. Where such a showing can be made, courts normally grant such applications. As noted above, the Department is developing guidelines for prosecutors as to when judicial proceedings should be closed. In the meantime, we have directed federal prosecutors practicing in districts which follow a general open-proceeding rule to apply for in camera proceedings in all appropriate cases. Of course, prosecutors should accompany any request for an in-camera proceeding with an application for filing of related pleadings and papers under seal.

2. Grand Jury Subpoenas

Practices also vary as to the handling of grand jury subpoenas. In most districts, grand jury subpoenas are returned to, and maintained by, district court clerks usually under seal but sometimes among public court records. We see no compelling policy reason to permit ready public access to such subpoenas, at least prior to the return of an indictment. We are urging federal prosecutors in districts which maintain grand jury subpoenas among public court records to discuss with the chief judges of their respective districts the possibility of maintaining such subpoenas among sealed records, at least until an indictment has been returned in the cases in which the subpoenas were issued.

3. Evidence Presented to a Grand Jury

The report notes that opinions vary as to whether evidence presented to the grand jury must be accorded the protection of Rule 6(e). The simple fact is that laws and rules vary depending upon the nature and source of such evidence. Statutory law, for example, requires that certain financial records obtained pursuant to grand jury subpoena be accorded the full protection of Rule 6(e), Right to Financial Privacy Act of 1978 (12 U.S.C. 3420). Legislation is pending before the Congress to establish a similar rule for certain medical and insurance information when obtained pursuant to grand jury subpoena. The Department endorses this approach. Emerging privacy statutes, therefore, are requiring that information of a privacy intrusive nature be handled with secrecy when obtained by a grand jury. Otherwise, courts have frequently ruled that mere subpoena by or presentation to a grand jury does not make information secret where it is needed, for its own intrinsic value, by a federal agency, United States v. Interstate Dress Carriers, 280 F.2d 52 (2d Cir. 1960); a Congressional Committee, In Re Hearings Before

Committee on Banking and Currency, 19 F.R.D. 410 (N.D. Ill. 1956) and In Re Grand Jury Investigation of Ven-Fuel, 441 F.Supp. 1299 (M.D. Fla. 1977), or others with an independent right to review the information in question, Capitol Indemnity Corp. v. First Minnesota Construction Co., 405 F.Supp. 929 (D. Mass. 1975).

Furthermore, evidence presented to grand juries is often obtained from among public records; e.g., public reports of federal, state and local regulatory bodies such as the Securities and Exchange Commission (SEC), state corporation commissions, financial supervisory agencies, licensing boards, bureaus of vital statistics, etc. While the fact that such public information was presented to a particular grand jury should obviously be secret, it would be inappropriate and unnecessary to require that a copy of a public SEC report be locked in a safe with grand jury transcripts simply because it was presented to a grand jury, or to require that a federal prosecutor should apply to a court for a Rule 6(e) order to lend the same SEC report to an investigator for use in another case.

In short, we do not believe that the report reflects an appreciation of the difficulty of developing definitive rules for the handling of the myriad varieties of information presented to grand juries. Notwithstanding these difficulties, a Department task force is now attempting to develop a working definition of "grand jury information" for purposes of achieving uniform security practices by Department personnel.

4. Impaneling Grand Juries

The report suggests that more should be done to keep the identity of grand jurors secret and to screen jurors.

With respect to secrecy as to the identity of grand jurors, the Jury Selection and Service Act established the policy that grand and petit juries shall be "selected at random from a fair cross section of the community in the district or division wherein the court convenes." See 28 U.S.C. 1861. While district courts are given certain discretion in the matter under 28 U.S.C. 1863(b)(7), the Act contemplates that the selection process will be open to public scrutiny and that both the government and a defendant held to answer in the district court enjoy rights to challenge the array of jurors or individual jurors, Rule 6(b), F.R.Cr.P. Persons otherwise qualified to serve as grand jurors may be excused, for example, if they are unable to render impartial service or might adversely affect the integrity of jury deliberations, 28 U.S.C. 1866(c). Once impaneled as a grand juror, a person may be excused by the court "at any time for good cause shown." Rule 6(g), F.R.Cr.P.

It must be emphasized that, while a certain number of grand jury proceedings are highly sensitive, most are not. As indicated above, important interests are served in having a public process for selecting jurors. Furthermore, the Congress has provided such penal statutes as 18 U.S.C. 1503 and 1504 to protect grand jurors from threats or harassment. These statutes, as do those previously cited, contemplate that the identity of grand jurors will generally be public. When extraordinary situations arise, we believe that the courts and the Department can react appropriately under existing laws and procedures.

As for screening of grand jurors, government attorneys are instructed by the United States Attorneys' Manual, 9-11.327, to inform the district court, especially when sensitive investigations are to be undertaken, of facts which might be pertinent during the jury selection process to cause the exclusion of prospective jurors under 28 U.S.C. 1866(c). There have been instances where jurors have been disqualified because of conflict of interest, e.g., United States v. Gibson, 480 F.Supp. 339 (S.D. Ohio, 1979).

While the report cites a dramatic case indicative of a need for greater screening of grand jurors, the Department is not persuaded that conflicts of interest are a significant problem which warrants reforms in law or practice. In this regard, the report does not reflect an appreciation of the difficulties involved in effectively screening grand jurors who may consider dozens of different cases over a period of up to 18 months. Moreover, any truly effective screening would require exhaustive background investigations raising privacy considerations. In the absence of extraordinary circumstances, we believe there are limits to be recognized regarding the extent to which the private lives of grand jurors should be explored.

5. Security and Handling Procedures for Transcripts and Materials Covered by Rule 6(e)

Department security specialists have long recognized the need for improved security measures on the part of federal prosecutors and court reporters who transcribe grand jury proceedings. The task of developing uniform measures has been a difficult one due to the varying judicial procedures followed by different district courts, the wide range of facilities occupied by federal prosecutors, and the varying organizational structures of United States Attorneys offices, Organized Crime

Strike Forces, and Criminal Division offices and sections. A final draft order establishing minimum national security standards for federal prosecutors and court reporters has now been developed, and will be issued in the near future. Generally, this order would establish uniform Department procedures for requesting, processing and adjudicating security clearances for court reporters and support personnel who record grand jury proceedings. In addition, the order would establish physical security standards for court reporters and Department personnel. In short, we are taking steps to improve security on the part of Department personnel and contractors.

Because the other recommendations in the report involve building facilities administered by the Administrative Office of the United States Courts, they are better addressed by the Administrative Office than by the Department.

CONCLUSION

Breaches of grand jury secrecy can result in serious harm to witnesses, grand jurors and to subjects of investigation, but the most frequent effect of such breaches is to jeopardize criminal investigations. As the chief criminal investigative and prosecutorial arm of the federal government, the Department has a vital stake in safeguarding grand jury secrecy. We recognize, however, that grand jury secrecy is not and cannot be absolute because other societal interests, including the principle of open government, the right to a public trial, the right to a fair and impartial jury, and the right to effective assistance of counsel, sometimes require that some aspects of grand jury proceedings be made public. We do believe that improved security measures by federal prosecutors and court reporters, together with the further efforts we have already undertaken regarding in camera proceedings and maintenance of pleadings and process under seal, can reduce the incidence of inadvertent breaches of grand jury secrecy. The adoption of rigid national secrecy rules in all the areas suggested by the report, however, seems both impractical and inadvisable. Moreover, while we appreciate that GAO, as a legislative agency, is naturally oriented toward the development of statutes, rules and regulations, we believe that experience has proven that many issues of judicial procedure and administration are best left to the sound discretion of courts to be determined on a case-by-case basis taking into account all the circumstances of the particular case.

In summary, many day-to-day aspects of judicial administration relating to grand jury secrecy require that a delicate balance be struck between the principles underlying the rule

APPENDIX IV

of grand jury secrecy and competing principles. In focusing narrowly on the interests of grand jury secrecy, we believe GAO has seriously overestimated the problem of preserving grand jury secrecy and that it has put forward recommendations which do not reflect a proper respect for competing interests. We sincerely hope, therefore, that this draft report will be subjected to careful review within GAO before publication.

We appreciate this opportunity to comment on the draft report and will be pleased to furnish such additional information as you may require.

Sincerely,

Kevin D. Rooney
Assistant Attorney General
for Administration

APPENDIX V

Memorandum

Subject	Date
Grand Jury Secrecy	6 AUG 1980

To: All United States Attorneys

From: William P. Tyson
Acting Director
Executive Office for
U.S. Attorneys

A recent General Accounting Office review of grand jury procedures points up the need for certain actions on the part of the Department's attorneys to protect the secrecy of grand jury proceedings. All Department personnel whose responsibilities involve access to matters occurring before federal grand juries should be aware of the need to protect the secrecy of grand jury proceedings.

We have been working with the Criminal Division and the Office of the Deputy Attorney General to develop guidance in the area of grand jury secrecy for the Department's prosecutors. We are considering recommending that the Department adopt the following policy. We expect to consult with the Attorney General's Advisory Committee of United States Attorneys and other Department components and publish the policy in the United States Attorneys' Manual. If you have any comments or suggestions you may wish to bring them to the attention of a member of the Advisory Committee or Larry McWhorter of this office.

1. General Policy. Preservation of grand jury secrecy is of the utmost importance to the proper functioning of the criminal justice system. See Rule 6(e), F.R.Cr.P. and USAM 9-11.360.

2. Judicial Proceedings Ancillary to Grand Jury Proceedings. The Department has published a proposed policy with regard to open judicial proceedings. 45 Federal Register 52183, August 6, 1980. Public comment on the proposed rules will be received until September 15, 1980. The proposed policy provides that the guidelines do not apply to:

> "... in camera inspection, or the receipt, consideration or sealing, during the course of an open proceeding and as governed by substantive or procedural law (including

the rules of evidence), of the following: trade secrets or similar commercial information, material which jeopardizes confidential investigative sources and methods, or grand jury information."

Accordingly, the government counsel should apply for in camera hearing of ancillary proceedings */ in appropriate cases, e.g., where there is reason to believe that open proceedings will result in physical harm to any person; flight from prosecution; tampering with evidence, witnesses or jurors; or a significant disclosure of matters occurring before the grand jury. Of course, such applications should be accompanied by applications for filing of related pleadings and papers under seal.

3. Filing of Grand Jury Subpoenas. Grand jury subpoenas are filed among public court records in a few districts. United States Attorneys in those districts are urged to discuss with the chief judge of the district the possibility of filing such subpoenas among sealed court records at least pending return of indictments in the cases in which they were issued. In this regard, the Department is unable to discern any significant public policy interest served by maintaining grand jury subpoenas among records readily available to the public during the pendency of a grand jury investigation.

4. Impaneling of Grand Juries. Prosecutors are reminded of the need, particularly in connection with sensitive grand jury proceedings, to inform the court of facts indicating potential grand juror conflicts of interst and other matters pertinent during the grand jury selection process. See USAM 9-11.327, 28 U.S.C. 866(c) and United States v. Gibson, 480 F.Supp. 339 (S.D. Ohio, 1979).

5. Security and Handling Procedures for Rule 6(e) Materials. A Department order will be issued in the near future governing security clearances for court reporters and support personnel who record grand jury proceedings, and establishing physical security standards for court reporters and Department personnel. See also USAM 10-2.195, Personnel Security - Grand Jury Reporters.

6. Wilful Breaches of Grand Jury Secrecy. Conscious violations of Rule 6(e), F.R.Cr.P., should be accorded high priority for investigation and prosecution.

*/ E.g., Motions to quash/enforce grand jury subpoenas, immunity applications, habeas corpus proceedings.

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